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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-317

Docket No. 1862

BEN D. LEUTY, *Petitioner,*

v.

THE STATE OF NEW JERSEY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF NEW JERSEY, MIDDLESEX COUNTY

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Dated: June 21, 1971
New York, New York

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF NEW JERSEY, MIDDLESEX COUNTY

Petitioner Ben D. Leuty respectfully prays that a writ of certiorari issue to review the judgment of the Superior Court of the State of New Jersey, Middlesex County, entered December 8, 1969. That judgment denied petitioner's motion to dismiss an indictment on the ground of double jeopardy. It is appended as Appendix A hereto.

OPINION BELOW

The opinion of the Superior Court has not been reported. It is appended as Appendix B hereto.

JURISDICTION

The judgment of the Superior Court, Middlesex County, was entered December 8, 1969. Leave to appeal that judgment was denied by orders of the Appellate Division of the Superior Court January 15, 1970, and by the Supreme Court of New Jersey March 22, 1971. Those orders are appended as Appendix C hereto. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. The Federal authorities having already tried petitioner for alleged violation of the New Jersey bribery statute, N.J.S.A. 2A:93-6 (by authority of 18 U.S.C. § 1952), may New Jersey retry him, under a virtually identical indictment, for the same alleged violation of the identical statute by the same conduct?

2. Should *Bartkus* v. *Illinois*, 359 U.S. 121, be expanded to permit New Jersey so to place petitioner again in jeopardy?

3. Should *Bartkus* be overruled?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Amend. V:

> "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

U.S. Const., Amend. XIV:

> ". . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

N.J.S.A. 2A: 93-6:

"Any person who directly or indirectly gives or receives, offers to give or receive, or promises to give or receive any money, real estate, service or thing of value as a bribe, present or reward to obtain, secure or procure any work, service, license, permission, approval or disapproval, or any other act or thing connected with or appertaining to any office or department of the government of the state or of any county, municipality or of any public authority, is guilty of a misdemeanor."

* * *

18 U.S.C. § 1952:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

* * *

"(3) . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in [subparagraph] . . . (3), shall be fined not more than . . . $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means . . . (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."

* * *

STATEMENT OF THE CASE

In February 1967 petitioner Leuty was accused by a Federal grand jury in New Jersey, along with nine co-defendants, of committing bribery and conspiring to commit bribery in violation of New Jersey Statute 2A: 93-6. Federal jurisdiction was premised on 18

U.S.C. § 1952. The Federal indictment charged petitioner with seven substantive violations of New Jersey's bribery statute and with participation in two conspiracies to violate that statute (see Appendix D hereto).

The crimes alleged arose out of the construction of a pipeline system by Colonial Pipeline Company, of which petitioner was president. The project required a terminal facility in Woodbridge, New Jersey. The Government alleged, and petitioner conceded, that certain payments were made to Woodbridge public officials. The Federal indictment charged that the payments were bribes. Petitioner's defense was that they were shakedowns coerced from Colonial Pipeline by Woodbridge officials. Petitioner, as president of Colonial Pipeline, was charged with having authorized the payments to the Woodbridge officials.

The Federal trial lasted ten weeks. Petitioner conceded the involvement of interstate facilities. The sole disputed factual issue at trial, so far as petitioner was concerned, was whether he had acted with the corrupt intent that is a necessary element of the offense of bribery under New Jersey law.[1] For petitioner, the issues in dispute at the Federal trial involved only questions of State law—questions arising because the Federal indictment incorporated the New Jersey bribery statute. Thus, counsel for the Government and petitioner argued questions of interpretation and application of the New Jersey statute; the District

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[1] Petitioner's defense was that he lacked this intent and that he was the victim of a shakedown. It was his claim that he acted in response to the coercion of the town officials and from fear of injury to his company.

Court charged the jury extensively on New Jersey law and drew its definition of the offense of bribery from New Jersey court decisions.

In January 1969 the Federal jury acquitted petitioner of the seven substantive charges, but convicted him on the two conspiracy counts.[2]

Less than two weeks after the Federal jury brought in its verdict, and two years after the Federal indictment was returned, a New Jersey grand jury returned an indictment against petitioner arising from the identical transactions and charging the identical offenses that had been at issue in the Federal trial. For all practical purposes, the New Jersey indictment now pending against petitioner is a photocopy of its Federal counterpart. Aside from the deletion of the allegations relating to interstate facilities and the removal of two substantive charges as to which the State statute of limitations had run, the State indictment virtually tracks the Federal indictment—word for word, detail for detail. The two indictments are set out in Appendix D side by side for this Court's comparison.[3]

Thus, although he has once "run the gauntlet" on seven substantive charges and two conspiracy charges drawn under the New Jersey bribery statute, and has undergone a ten-week trial on those charges, petitioner is about to undergo a second trial on the same charges under that statute. The State prosecutor is about to

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[2] On appeal, the Court of Appeals for the Third Circuit has vacated petitioner's conspiracy convictions on the ground that the federal grand jury was improperly impanelled. The Government has sought rehearing of that decision, but the Court of Appeals has not yet acted on the application.

[3] A defendant in the Federal action who was granted immunity at the outset of the Federal trial was not indicted by the State.

have the opportunity to try to convict petitioner—not only on the substantive charges where the Federal prosecutor failed, but on the conspiracy charges where the Federal prosecutor succeeded.

Petitioner has sought but failed to persuade the New Jersey courts that subjecting him to trial under the pending State indictment will violate his Federal constitutional rights. The Superior Court of New Jersey has denied petitioner's motion for an order dismissing the State indictment on the ground that the upcoming trial will place him twice in jeopardy. In so doing, the State court has relied upon an expansive interpretation of this Court's decision in *Bartkus* v. *Illinois,* 359 U.S. 121, together with a subsequent New Jersey decision invoking that authority.[4] The intermediate and highest appellate courts in New Jersey have declined to review the Superior Court's decision.

Application for a stay of State proceedings pending the filing of this petition, presented to Mr. Justice Brennan as Circuit Justice, was denied by him April 23, 1971.[5]

REASONS FOR GRANTING THE WRIT

The judgment below rests solely upon an expansive interpretation of this Court's prior decision in *Bartkus* v. *Illinois,* 359 U.S. 121. But nothing in *Bartkus* sanctions successive Federal and State prosecutions predicated upon the same State penal statute. And

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[4] *State* v. *Cooper,* 54 N.J. 330, 255 A.2d 232 (1969).

[5] Petitioner understands that other co-defendants named in the State indictment who unsuccessfully moved to dismiss will also seek this Court's review of the judgment below.

the validity of *Bartkus* is now in doubt in light of subsequent decisions of this Court. The Court thus should grant the writ at least to clarify the reach of *Bartkus* and, if necessary, to consider whether *Bartkus* should be overruled.

The judgment sought to be reviewed is final for purposes of this Court's jurisdiction. See 28 U.S.C. § 1257(3). The New Jersey Superior Court's denial of petitioner's motion to dismiss the State indictment on grounds of double jeopardy conclusively determines that petitioner must undergo a second trial. If petitioner is correct on the merits of his constitutional argument, then the mere holding of that trial will destroy his Federal constitutional rights. Subsequent review could not redress the denial of those rights. Review would only be available to prevent double punishment; it would come too late to prevent double jeopardy. The double jeopardy prohibition "is not against being twice punished, but against being twice *put* in jeopardy . . . ." *Price* v. *Georgia,* 398 U.S. 323, 326, quoting *United States* v. *Ball,* 163 U.S. 662, 669 (emphasis supplied in *Price*).

The judgment below thus determines "a separate and independent matter" from petitioner's guilt or innocence, "anterior to the merits and factual and legal issues of [New Jersey's] cause of action." *Mercantile National Bank* v. *Langdeau,* 371 U.S. 555, 557-58. The Court should now resolve whether petitioner must undergo a second trial, and thus be subjected to "long and complex litigation which may be for naught if consideration of the preliminary question . . . is postponed until the conclusion of the proceedings." *Id.* at 558. See also *Hudson Distributors* v. *Eli Lilly & Co.,* 377 U.S. 386, 389 n. 4; *Local No. 438, Construc-*

tion & General Laborers Union v. *Curry*, 371 U.S. 542, 548-52.[6]

The present petition for review satisfies the criteria for finality that the Court has previously prescribed. There is no indication that the New Jersey courts have applied a less rigorous standard in arriving at the judgment below than will be the case in any judgment they may reach following petitioner's retrial; a second trial could not reveal further facts or legal arguments bearing upon the question now tendered for review; and the decision of the New Jersey court threatens a substantial invasion of a central constitutional guaranty—the prohibition against multiple prosecutions for the same offense. See *Organization for a Better Austin* v. *Keefe*, —— U.S. ——, —— n., 39 U.S.L.W. 4577, 4578 n. (May 17, 1971). And see *Rosenblatt* v. *American Cyanamid Co.*, 86 S. Ct. 1, 3.

I. Bartkus v. Illinois Should Not Be Expanded To Permit Successive Federal and State Prosecutions Predicated on the Same State Penal Statute and the Same Conduct.

Petitioner has undergone a ten-week Federal trial, following which the jury has acquitted him of seven substantive charges based on the New Jersey anti-bribery statute and convicted him of two conspiracy charges of conspiracy to violate that statute. Now New Jersey proposes to try petitioner again under the same State statute with respect to both the sub-

[6] Generally, the final judgment in a State criminal proceeding is the sentence or judgment of conviction. *E.g.*, *Edwards* v. *California*, 314 U.S. 160, 171. But the Court has recognized exceptions to that rule. One such exception arises where, as here, the issue presented for review represents " 'a serious and unsettled question' . . . 'independent of, and unaffected by', . . . what many transpire" at a second trial. *Brady* v. *Maryland*, 373 U.S. 83, 85 n. 1.

stantive charges on which he was acquitted and the conspiracy charges on which he was convicted.[7] In permitting the State to go forward, the Court below has relied exclusively on this Court's prior decision in *Bartkus* v. *Illinois*, 359 U.S. 121. But nothing in *Bartkus* permits such a flagrant departure from the basic constitutional guaranty against double jeopardy.

In *Bartkus* a sharply divided Court upheld petitioner's State conviction for robbery even though he had previously been tried and acquitted in a Federal court on a charge, arising from the same events, of robbing a Federally insured savings and loan association. The dual bases of decision in *Bartkus* were the no longer valid propositions that the Fifth Amendment's protection against double jeopardy did not apply to the States as such (359 U.S. at 124), and that the double prosecution there presented did not offend Fourteenth Amendment due process (*id.* at 131).

The holding concerning due process in *Bartkus* rested on the proposition that the Federal and State governments were dual sovereigns, each with its own interests to preserve and each with the power to enforce those interests through criminal sanctions. Es-

[7] The fact that the United States Court of Appeals for the Third Circuit has vacated petitioner's conspiracy convictions has no bearing on the issues here tendered for review. Petitioner cannot be retried in the Federal courts on the substantive counts, as to which he was acquitted, even though the underlying indictment has subsequently been held invalid. *Benton* v. *Maryland*, 395 U.S. 784, 796-97. And, if it were assumed *arguendo* that petitioner might be retried in the Federal court on the conspiracy counts, as to which he was convicted (an assumption petitioner rejects), the concept of "continuing jeopardy" that might permit retrial applies only to the court where prosecution began and cannot sanction the institution of duplicative criminal proceedings in another jurisdiction. See *Price* v. *Georgia*, 398 U.S. 323, 326.

sential to decision in *Bartkus* was the notion that the burden of dual trials and the imposition of dual penalties arising from a single transaction or event were justified because that transaction or event had offended the separate—and different—concerns of each of two governing authorities. Thus, in *Bartkus* itself, the Federal interest in preserving the financial integrity of Federally insured savings and loans associations was found to differ from the State interest in deterring and punishing the act of armed robbery.[8]

Indeed, even the majority in *Bartkus* recognized an exception to its general rule "in a case in which the second trial is for a violation of the very statute whose violation by the same conduct has already been tried in the courts of another government empowered to try that question" (359 U.S. at 130, citing *Houston* v. *Moore,* 5 Wheat. (18 U.S.) 1 (footnote omitted)).

This case is that exception. The State Government is about to subject petitioner to a "second trial" for an alleged "violation of the very statute whose violation by the same conduct has already been tried in [a Federal court] . . . empowered to try that question." The sole difference between the Federal and State cases here is that the Federal indictment alleged the involvement of interstate commerce. At the Federal trial that extra issue was surplusage so far as petitioner was concerned. Petitioner conceded its pres-

[8] *Bartkus* relied upon the prior decision in *Fox* v. *Ohio,* 5 How. (46 U.S.) 410, where the Court had concluded that "both the Federal and State Governments retained the power to impose criminal sanctions [for the utterance of counterfeit money], the United States because of its interest in protecting the purity of its currency, the States because of their interest in protecting their citizens against fraud" (359 U.S. at 129).

ence in his case and there was no dispute about the matter. In essence, it amounted to a mere jurisdictional prerequisite to the maintenance of a prosecution based upon New Jersey law.

This identity of the Federal and State cases comes as no surprise. For the thrust of § 1952, as this Court has previously recognized, is not the protection of an independent Federal interest but the "backstopping" of State interests in situations where, for one reason or another, the States are unable to fend for themselves. Thus, in *United States* v. *Nardello,* 393 U.S. 286, the Court noted that the Attorney General had told the Senate Committee on the Judiciary that "the purpose of [§ 1952] . . . was to aid local law enforcement officials . . . . [B]y creating a federal interest in limiting the interstate movement necessary to . . . operations [of criminal elements], criminal conduct beyond the reach of local officials could be controlled" (393 U.S. at 290-91). The Court concluded that at the heart of the Congressional intent was the purpose "to aid local law enforcement officials . . . ." *Id.* at 293-94.

But surely the fact that the Federal Government may prosecute *in place of* State action does not mean that *Bartkus* should be expanded to permit the State to prosecute *in addition to* the Federal Government. *Bartkus* rested on the conclusion that the institutional interests of State and Federal Governments outweighed the individual interests protected by the constitutional guaranty against double jeopardy. The interest in federalism diminishes dramatically, if it does not vanish, when State and Federal Governments engage in duplicate enforcement of local law. *Cf. Perez* v. *United*

States, —— U.S. ——, ——, 39 U.S.L.W. 4484, 4488 (April 27, 1970) (Stewart, J., dissenting).[9]

Indeed, the Federal Government has expressly disclaimed any Federal interest in duplicative prosecutions. Shortly after *Bartkus* was decided, the Attorney General stated that "it is the general policy of the Federal Government that 'several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement.'" *Petite* v. *United States,* 361 U.S. 529, 530. This policy is "closely related to that against duplicating federal-state prosecutions." *Id.* at 531.

There would have been no danger of duplicative prosecutions if New Jersey had not delayed prosecuting petitioner under its bribery statute. If the State had brought petitioner to trial before the Federal trial commenced, the Federal Government, under its established policy, would not have gone forward with its action. See *Petite* v. *United States, supra.* The State had ample opportunity to do this. The Federal indictment, which was given wide publicity, was issued in February 1967, and the Federal trial did not commence until November 1968. However, instead of acting to enforce its bribery laws, New Jersey waited until February 1969, after petitioner

[9] See also Note, "Dual Prosecutions by State and Federal Governments: Another Exercise in Federalism," 80 Harv. L. Rev. 1538, 1542-43; Pontikes, "Dual Sovereignty and Double Jeopardy: A Critique of *Bartkus* v. *Illinois* and *Abbate* v. *United States,*" 14 West. Res. L. Rev. 700, 712-17; Model Penal Code, Section 1.10(1)(a) (first prosecution a bar unless "the law defining each of [the] . . . offenses is intended to prevent a substantially different harm or evil").

had been tried under those laws in the Federal court. Thus, petitioner's constitutional rights are now endangered only because New Jersey, having elected to stand aside for two years while the Federal Government prosecuted petitioner under the State bribery statute, now wants to repeat the prosecution and put him again in jeopardy.

Confining *Bartkus* so as not to permit the threatened prosecution will give rise to none of the evils feared by the Court in *Bartkus's* companion case, *Abbate* v. *United States,* 359 U.S. 187. There the petitioners had conspired to blow up communications transmission towers in Missouri. The Court sustained a Federal prosecution for interference with communication systems of the Federal Government following a State trial and conviction for destroying private property. The *Abbate* Court was concerned that to foreclose Federal prosecution in the circumstances there presented could deprive the national government of the authority to protect an interstate communication system through a State's prior assertion of jurisdiction followed by a sham trial or nominal penalty. See 359 U.S. at 202 n. 2.

Here, however no one suggests that petitioner's ten-week Federal trial was a hoax. Moreover, both the Federal and State penalties for substantive and conspiracy violations of New Jersey's bribery statute are substantial.[10] More importantly, however, *Abbate*'s

[10] The maximum penalties for a substantive violation of § 1952 and for a conspiracy to violate that section as forbidden in 18 U.S.C. § 371 are a $10,000 fine and a five-year imprisonment. The corresponding penalties for both the substantive and conspiracy violations of New Jersey's anti-bribery statute are a maximum of $1000 and a three-year imprisonment, N.J.S.A. 2A:85-7.

concerns do not arise where, as here, both prosecutions are based on the same alleged violation of the same statute by the same conduct. Where a "backstop" statute is involved, there are no separate Federal and State interests to protect. Thus, where the Federal Government has vigorously prosecuted petitioner for violating New Jersey's bribery statute, denying New Jersey the opportunity to retry him cannot deprive it of the protection of its interest.

To interpret *Bartkus,* or *Abbate,* otherwise would give rise to pernicious consequences. For the Federal Government has now increasingly involved itself in local law enforcement. Only last Term the Court dealt with the Consumer Credit Protection Act, 18 U.S.C. §§ 891 *et seq.,* where Congress has, among other things, outlawed "loan sharking" without any requirement that an individual defendant be proved to have used interstate facilities or to have affected them. *Perez* v. *United States, supra.* Other examples of the new breed of Federal criminal statute, either duplicating State criminal law or merely incorporating it wholesale, abound in Title 18 of the United States Code. Some of them, as in § 1952, expressly mandate an interstate nexus; others, as in the section involved in *Perez,* do not.[11]

The questions presented by this petition will therefore arise in prosecutions under a large number of Federal and State statutes. Petitioner respectfully submits that the Court should take this opportunity to resolve these questions, both to do justice to pe-

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[11] See, *e.g.,* 18 U.S.C. § 922(b)(2) (sale of firearms in violation of State law); 18 U.S.C. § 1511 (conspiracy to obstruct state criminal laws to facilitate violation of State laws); 18 U.S.C. § 1955 (gambling business in violation of State law); 18 U.S.C. §§ 1961, 1962 (use of income derived from violation of State law).

titioner and to guide those engaged in the administration of criminal justice.

II. Bartkus Should Be Overruled

For the reasons above set forth, *Bartkus,* properly read, does not permit the threatened prosecution. But the decisions of the Court subsequent to *Bartkus* have brought it so far into question that the Court should now reconsider the case with a view to overruling it.

The decision in *Bartkus* rested on the standard elaborated in *Palko* v. *Connecticut,* 302 U.S. 319. On the "fundamental fairness" test there set forth, the *Bartkus* Court concluded that "successive state and federal prosecutions for different crimes arising from the same acts [were not] . . . repugnant to those standards of outlawry which offend the conception of due process" (359 U.S. at 131). That analysis derived from the conclusion last articulated in *United States* v. *Lanza,* 260 U.S. 377, that the Federal and State Governments were "dual sovereignties," each entitled to assert its own authority to protect its interests by criminal prosecution (*id.* at 128-34).

Four Justices dissented in *Bartkus.*[12] Subsequent decisions of the Court have eroded the doctrinal basis of *Bartkus* and established that it is no longer valid law.

1. In *Waller* v. *Florida,* 397 U.S. 387, the Court ruled that the "dual sovereignty" argument could not support successive prosecutions by State and local au-

[12] Mr. Justice Black, speaking for himself, Mr. Chief Justice Warren, and Mr. Justice Douglas, would have applied the constitutional prohibition against double jeopardy directly to the States (359 U.S. at 151-55). Mr. Justice Brennan, with whom the Chief Justice and Mr. Justice Douglas joined, dissented on the ground that the extent of participation of federal authorities in furthering the subsequent state prosecution turned the state trial into a second federal prosecution (*id.* at 165-66).

thorities for an offense against a State statute and municipal ordinance arising from a single act or transaction. In declining to extend the *Bartkus* rationale to the case before it, the *Waller* Court returned to the long-standing rule that the double jeopardy prohibition bars prosecutions by different Governments. *Nielsen* v. *Oregon*, 212 U.S. 315, 320 (successive prosecutions by States); *United States* v. *Furlong*, 5 Wheat. (18 U.S.) 184, 197 (prosecution by the Federal Government following prosecution in another country). The decision in *Waller* thus leaves *Bartkus* more an anomaly in the law than ever before.

2. In *Benton* v. *Maryland*, 395 U.S. 784, the Court expressly overruled the *Palko* decision upon which *Bartkus* rested (395 U.S. at 794). The Court concluded that the prohibition against double jeopardy contained in the Fifth Amendment "represents a fundamental ideal in our constitutional heritage . . . and . . . should apply to the states through the Fourteenth Amendment" (*ibid.*). Mr. Justice Marshall, speaking for the *Benton* Court, reviewed the fundamental nature of the constitutional guaranty, traced its origins to ancient times and its establishment in the common law of England, and pointed to its universal inclusion in the Federal and State constitutions of this country (*id.* at 795).[13]

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[13] "As this Court put it in *Green* v. *United States*, 355 U.S. 184, 187-88 (1957), '[t]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' This underlying notion has from the very beginning been part of our constitutional tradition. Like the right to trial by jury, it is clearly 'fundamental to the American scheme of justice.'" *Id.* at 795-96.

The destruction of *Palko* encompasses its progeny as well. *Bartkus,* being of "the same genre" as *Palko,* necessarily shared *Palko's* fate in *Benton. Price* v. *Georgia,* 398 U.S. 323, 330 n. 9.

3. Just as the "due process" rationale of *Palko* has been repudiated, so the "dual sovereignty" reasoning of *Lanza* has been rejected, in *Murphy* v. *Waterfront Comm'n,* 378 U.S. 52. *Murphy* followed upon the Court's ruling in *Malloy* v. *Hogan,* 378 U.S. 1, that the Fifth Amendment privilege against self-incrimination applies to the States through the Fourteenth Amendment. The *Murphy* Court held that in light of the *Malloy* decision, the old "dual sovereignty" argument could no longer justify the notion that the States could compel inculpatory testimony without regard to the consequences under Federal law for the person compelled.

In reaching its conclusion, the *Murphy* Court took note of the fundamental nature of the constitutional guaranty involved; it pointed to the danger of "whipsawing" a witness into incriminating himself before both State and Federal authorities, even though the constitutional guaranty was applicable to each; it recognized that *Malloy,* by applying the constitutional guaranty to the States, compelled reconsideration of the "established rule" hitherto governing the issue before it; and it reviewed the historic basis upon which that "established rule" rested, revealing the inaccuracies and shortcomings of prior analysis.

A similar process here compels the conclusion that *Bartkus,* along with the *Lanza* decision upon which *Bartkus* rests, is not good law.

(a) Just as the privilege against self-incrimination stands as "one of the great landmarks in man's strug-

gle to make himself civilized,"[14] and reflects fundamental values in the structuring of the relationship between the individual and his government, so does the prohibition against double jeopardy represent a central value in our constitutional scheme. See *Benton* v. *Maryland, supra; Bartkus* v. *Illinois, supra* (Black, J., dissenting). As Mr. Justice Brennan has recently said, "The Double Jeopardy Clause is a guarantee 'that the State with all its resources and power [shall] not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a constant state of anxiety and insecurity . . . .'" *Ashe* v. *Swenson,* 397 U.S. 436, 450 (concurring opinion), quoting *Green* v. *United States,* 355 U.S. 184, 187.[15] See also *United States* v. *Jorn,* 400 U.S. 470, 479 (opinion of Harlan, J.).[16]

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[14] E. Griswold, *The Fifth Amendment Today,* 7 (1955), quoted in *Murphy* v. *Waterfront Comm'n, supra,* at 55, and *Ullmann* v. *United States,* 350 U.S. 422, 426.

[15] These considerations have led Mr. Justice Brennan to conclude that "abuse of the criminal process is foremost among the feared evils which led to the inclusion of the Double Jeopardy Clause in the Bill of Rights. That evil will be most effectively avoided, and the Clause can thus best serve its worthy ends, if [the constitutional phrase] 'same offense' is construed to embody the 'same transaction' standard" (397 U.S. at 459-460).

[16] "The Fifth Amendment's prohibition against placing a defendant 'twice in jeopardy' represents a constitutional policy of finality for the defendant's benefit in federal criminal proceedings. A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial. And society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws. Both of these considerations are expressed in *Green* v. *United States,* 355 U.S.

(b) The *Murphy* Court noted the risk of "whipsawing" between the State and Federal governments—an evil resulting in the effective deprivation of a constitutional guaranty through the action of State and Federal Governments together that neither could accomplish if acting alone. The identical danger exists in this case. The petitioner is about to undergo an arduous trial, based on the same transactions and founded on the same State statute that underlay the ten-week ordeal in the Federal court. If New Jersey is permitted to proceed on this indictment, Federal and State prosecutors will have mounted successive prosecutions based on the same State statute for the same conduct. *Cf.* Mr. Justice Brennan, concurring in *Ashe* v. *Swenson,* 397 U.S. at 460. Already the state prosecutor is in position to "organize . . . [his] . . . case for the second trial to provide the links missing in the . . . evidence that was offered at the first trial" (*id.* at 459 (Brennan, J. concurring)). The first trial will be treated "as no more than a dry run for the second prosecution" (*id.* at 447 (opinion of the Court)).

The danger of "whipsawing" has become especially real "in our age of 'cooperative federalism' where the federal and state governments are waging a united front against many types of criminal activity." *Murphy,* 378 U.S. at 55-56 (footnote omitted). As the Court has recently had occasion to observe:

> "In more recent times, with the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to

184, 187-188 (1957) . . . . These considerations have led this Court to conclude that a defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge. See *Green* v. *United States, supra,* at 188; *Wade* v. *Hunter,* 336 U.S. 684, 688 (1949)" (footnote omitted), *Jorn, supra.*

> spin out a startlingly numerous series of offenses from a single alleged criminal transaction . . . . As the number of statutory offenses multiplied, the potential for unfair and abusive reprosecutions became far more pronounced." *Ashe* v. *Swenson*, 397 U.S. 436, 445 n. 10.

(c) The *Murphy* Court held that its decision in *Malloy*, applying the privilege against self-incrimination to the States, compelled reconsideration of the "established rule" that the constitutional privilege did not protect a witness in one jurisdiction against the compulsion to give testimony that could be used to convict him in another jurisdiction (378 U.S. at 57). The same consideration obtains here. The Court's decision three Terms ago in *Benton*, enforcing the double jeopardy guaranty against the States, necessitates a similar review of the "established rule" that a Federal trial followed by conviction or acquittal raises no bar to a subsequent State trial for the same conduct. As the Court recognized in *Ashe* v. *Swenson*, *supra*, "the doctrine of *Benton* v. *Maryland* . . . puts the [double jeopardy issue] . . . in a perspective quite different from that in which the issues were perceived" when only considerations of Fourteenth Amendment "due process" were thought pertinent (397 U.S. at 442).

(d) Finally, the *Murphy* Court reviewed the historical basis and legal analysis upon which the prior decisions there under review had rested. That analysis revealed the inadequacies of reasoning—and even simple errors in the reading of precedent—that had unfortunately given rise to past decisions of the Court. Just such inadequacies and errors underlie the *Bartkus* decision. The English common law precedents are far from dubious, as the *Bartkus* Court thought, 359 U.S. at 128 n. 9; they clearly reject the "dual sovereignty"

theory.[17] The "precedents" upon which the decision in *Lanza* rested, and upon which the *Bartkus* Court in turn relied, are without exception either dicta or simply inapplicable.[18]

In sum, just as *Malloy* compelled the reconsideration and repudiation of former law in *Murphy,* so should *Waller* and *Benton* lead to the rethinking of *Bartkus* in this case.

The time is ripe to overrule *Bartkus.* It was unsound at the outset, and its analytical underpinnings have been destroyed by subsequent decisions of the Court. The passage of time often reveals the propriety of revising and overruling of precedent. See, *e.g., The Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U.S. 235, 241-43. See also *id.* at 255 (Stewart, J., concurring). Such review is particularly appropriate where constitutional guaranties are at stake, and past decisions are not subject to legislative correction. "The Court has not hestitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservations of basic liberties than that which was contemplated by its framers when they added the Amendment to our constitutional scheme." *Malloy* v. *Hogan,* 378 U.S. 1, 5.

Just as "it would be incongruous to have different standards determine the validity of a claim of double jeopardy depending upon whether the claim was asserted in a state or federal court," *Ashe* v. *Swenson,* 397 U.S. 436, 450 (Brennan, J., concurring), so it is

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[17] See discussion in Franck, "An International Lawyer Looks at the Bartkus Rule," 34 N.Y.U.L. Rev. 1096 (1959).

[18] See Discussion in Pontikes, "Dual Sovereignty and Double Jeopardy: A Critique of *Bartkus* v. *Illinois* and *Abbate* v. *United States,*" 14 W. Res. L. Rev. 700, 706-10.

now incongruous to permit the sterile "dual sovereignty" formula to place a defendant "twice . . . in jeopardy" for a single act.

As Mr. Justice Frankfurter had occasion to say:

> "When it appears that a challenged doctrine has been uncritically accepted as a matter of course by the inertia of repetition—has just 'grow'd' like Topsy—the Court owes it to the demands of reason, on which judicial law-making power ultimately rests for its authority, to examine its foundations and validity in order appropriately to assess claims for its extension." *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 551 (dissenting opinion).

CONCLUSION

For the foregoing reasons, petitioner prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

SIMON H. RIFKIND
Attorney for Petitioner
A Member of the Firm of
Paul, Weiss, Goldberg,
Rifkind, Wharton & Garrison
345 Park Avenue
New York, New York 10022

Of Counsel:

PAUL J. NEWLON
JAY GREENFIELD
NEIL H. COGAN

Dated: June 21, 1971
New York, New York

APPENDIX A

Judgment of the Superior Court of New Jersey

Superior Court of New Jersey
Middlesex County, Law Division (Criminal)

Nos. I. 417-68, I. 418-68, I. 419-68, I. 420-68
Docket Nos. 69-187, 69-188, 69-189, 69-190

STATE OF NEW JERSEY, *Plaintiff*,

v.

Colonial Pipeline Company, WALTER ZIRPOLO, ROBERT E. JACKS, Bechetel Corporation, Rowland Tompkins Corporation, BEN D. LEUTY, KARL T. FELDMAN, Gates Equipment Corporation, Gates Construction Corp.
Defendants.

This matter having been opened to the Court by various counsel representing all of the afore-mentioned defendants except Walter Zirpolo, and the State having been represented by Edward J. Dolan, Prosecutor of Middlesex County (J. Norris Harding, Assistant Prosecutor, appearing), and the Court having had an opportunity to consider the briefs and affidavits submitted as well as the oral arguments presented;

It is, on this eighth day of December 1969, ORDERED and ADJUDGED that the motions made by respective counsel for all the defendants except defendant Walter Zirpolo, for dismissal of the above indictments, based upon double jeopardy and/or collateral estoppel, be and the same are hereby dismissed for the reasons fully stated in the court's oral opinion delivered in open court on October 31, 1969, as by the record will more fully appear.

/s/ LEON GEROFSKY
Leon Gerofsky, A.J.S.C.

APPENDIX B

Opinion of the Superior Court of New Jersey

Superior Court of New Jersey
Middlesex County, Law Division (Criminal)

Nos. I. 417-68, I. 418-68, I. 419-68, I. 420-68
(Argued September 19, 1969 Decided October 31, 1969)
Docket Nos. 69-187, 69-188, 69-189, 69-190

STATE OF NEW JERSEY, *Plaintiff*,

v.

WALTER ZIRPOLO, ROBERT E. JACKS,
Colonial Pipeline Company,
KARL T. FELDMAN, BEN D. LEUTY,
Rowland Tompkins Corporation,
Bechtel Corporation, Gates
Construction Corporation,
Gates Equipment Corporation,
Defendants.

Before:

Honorable Leon Gerofsky, A.J.S.C.

Appearances:

Edward J. Dolan, Prosecutor
By J. Norris Harding, Assistant Prosecutor
For the State

Toolan, Romond & Burgess, Esqs.
By Arthur W. Burgess, Esq.
For defendant Jacks

Wilentz, Goldman & Spitzer, Esqs.
By Warren W. Wilentz, Esq.
For defendant Colonial Pipeline

Paul, Weiss, Goldberg, Rifkind, Wharton & Garrison, Esqs.
By Simon H. Rifkind, Esq.
For defendant Leuty

Pindar, McElroy, Connell, Foley & Geiser, Esqs.
By Adrian M. Foley, Jr., Esq.
For defendant Feldman

Shanley & Fisher, Esqs.
By Thomas F. Campion, Esq.
For defendant Bechtel Corporation

[2] The Court: Gentlemen, I have listened to all the argument here, after having devoted much time during the summer and since then to the briefs filed in this matter, and I am ready to call it. As I say, all of you rely upon your briefs, and I have read them, studied them, familiarized myself with all of the authorities recited therein.

The defendants here, other than the defendant, Zirpolo, have moved this Court for an order dismissing the indictments against them on the ground that trial in this Court would place them twice in jeopardy, and on the additional ground, raised by defendant, Leuty, that the State is collaterally estopped from prosecuting them. Today Leuty suggests an additional ground, a further ground that the Court should exercise supervisory power to bring to a halt this prosecution. That, though not specifically briefed, is summed up by my observation that it constitutes nothing more than that this Court should let its heart rule its head.

The defendants were first indicted in the United States District Court of New Jersey. They were charged, in many counts, with conspiring to violate and violating 18 U.S.C. code section 192 [sic] by using or causing others to use facilities in interstate commerce to promote, manage, establish, carry on and facilitate unlawful activity, to [3] wit, violations of New Jersey's bribery statute, *N.J.S.* 2A: 93-6. A trial was held and various judgments of convic-

tions and acquittal were entered on jury verdicts. The judgments of conviction are presently under appeal.

The Middlesex County Grand Jury subsequently indicted the same defendants. In all essential respects, save the loss of some counts through passage of time, the State indictments charge the defendants with unlawful conduct arising out of the same facts. The only substantive difference is that the State indictments do not charge that the conduct of the defendants was interstate.

The defendant, Jacks, has also moved for dismissal of indictments in which he alone is charged with extortion and misconduct in public office. He has not submitted a brief and is apparently relying on the briefs of other counsel. I assume that his position, for the purposes of this motion, is similar to that of the other defendants; however, any argument offered by the other defendants regarding the similarity of identity of offenses charged in the State and Federal indictments cannot serve any useful purpose here.

I turn to the argument that the indictments must be dismissed on the ground that trial in this Court would place them twice in jeopardy. The controlling authority on the issue of consecutive federal and state prosecutions [4] as placing a defendant twice in jeopardy, on both federal and state constitutional levels, is *State* v. *Cooper*, 54 *New Jersey* 330 (1969). In that case the New Jersey Supreme Court upheld prosecution of the defendant under both federal and state weapons statutes which were almost identical. In reaffirming the "dual sovereignty" theory announced in *Bartkus* v. *Illinois*, 359 *U.S.* 121, and other citations, the Court pointed out the ideological differences between the federal government and some of the states in determining the gravity of various criminal offenses and the frustration to national or state law enforcement policy which could result from a prohibition of a second trial by the other sovereign. It concluded that a subsequent prosecution by the state did not violate the United States Constitution, nor could the

Court find a violation of the N.J. Constitutional provision for the same reasons.

Cooper would appear to be conclusive on the issue before this Court since a "dual sovereignty" rationale certainly would apply to a federal interest in the stream of interstate commerce and a separate and distinct state interest in punishing law-breakers within its borders.

But defendants mount several attacks on *Cooper*.

First, defendants seem to imply that the New Jersey Supreme Court would not have decided *Cooper* the way it did had it done some additional research, and they urge this [5] Court to correct this oversight and reject the "dual sovereignty" theory since it has been "eroded". To sustain this contention, defendants cite several United States Supreme Court cases in which what they conveniently call the "dual sovereignty" theory was "rejected". *Res* v. *U.S.*, 350 *U.S.* 214 (1956). *Elkins* v. *U.S.*, 364 *U.S.* 206 (1960) and *Murphy* v. *Waterfront Commission of New York Harbor*, 378 *U.S.* 52 (1964). But these decisions represent only the application of the doctrine as it applies to the kind of evidence used in consecutive state-federal or federal-state prosecutions, not, as defendants would have it used here, to prevent a subsequent prosecution altogether.

Defendants next claim that, even if *Cooper* was correctly decided, it is distinguishable in that the federal statute there was designed to protect a matter of special federal concern, that is, the security of the national banking system and makes no reference to state law, while the state statute was designed to protect a distinctly different state concern, that is, protection of its citizens from dangerous weapons. However, the federal statute under which defendants were indicted here also protects a distinctly federal interest, that is, freeing interstate commerce from devices used to violate a law, the fact that the law violated was a state law is of secondary importance, whereas the state law

protects [6] citizens from the corruption of their government through bribery of public servants.

Nor does the fact that the *Cooper* court was concerned with an application for post-conviction relief make its decision any less binding on this Court since it cannot be presumed, despite defendants' suggestions, that the New Jersey Supreme Court would have applied two different standards on such an important constitutional issue in the absence of some clear indication to the contrary.

Having demonstrated why the dual sovereignty doctrine should no longer be adhered to, defendants go on to suggest that there is ample precedent for a state court's rejection of the United States Supreme Court decisions before they are expressly overruled by the highest court of the land. To soothe any apprehension this Court might have in taking so bold a step, defendants cite several state court decisions which had anticipated later Supreme Court rulings, and, specifically, an opinion by an Ohio trial court in *State* v. *Fletcher*, 15 *M;* 211, 240 *N.E.2d* 905 (1958), which found double jeopardy in a situation similar to the case at bar. Defendants fail to note, however, as did the court in *Cooper, supra,* 338, that:

> "* * * As stated in *Bartkus, supra,* of the twenty-eight states which have considered the validity of successive state and federal [7] prosecutions as against a challenge of violation of either a state constitutional double-jeopardy provision or a common-law evidentiary rule of *autrefois acquit* and *autrefois convict,* twenty-seven have refused to rule that the second prosecution was or would be barred." Citations.

Suffice it to say that even if this Court agreed with defendants' argument for the rejection of the "dual sovereignty" theory, it would hardly be propitious to fly in the face of a recent decision squarely on point by the highest court of this state on such dubious precedent.

Putting aside all considerations of double jeopardy, defendant Leuty next contends that the state prosecution here is barred by collateral estoppel, a somewhat nebulous offshoot of *res judicata* used in many criminal cases as a supplement to double jeopardy.

Even assuming, however, that the two prosecutions here present sufficient identity of issues and that no additional evidence could be pressed at the subsequent state prosecution, application of the doctrine of collateral estoppel still requires, as Leuty concedes, at least an identity of interests, if not a strict identity of parties. And if this Court accepts the "dual sovereignty" theory, as it is compelled to do by *Cooper, supra,* it [8] becomes immediately apparent that not only are the parties different, but the interests of each are not identical, the state's interest, therefore, not being fully protected in the prior federal prosecution, thus precluding the operation of the collateral estoppel rationale.

State v. *Cormier,* 46 *N.J.* 494, 505 (1966), on which Leuty relies, cites strict identity of parties as a prerequisite to the operation of the doctrine, and indeed that case involved two successive prosecutions by the same sovereign, the state. Nor do the other cases which Leuty cites, all civil, support an extension of the doctrine to the situation *sub judice* where two different sovereigns seek to vindicate separate policies underlying their separate penal laws. Rather, the Court looks to the more direct authority of *Ferina* v. *U.S.,* 340 *F.2d* 837 (*8th Cir.* 1965). There, the Court expressly declined to use either double jeopardy or *res judicata* to bar a federal prosecution for obstructing justice following a state acquittal for a felonious assault, even though both charges arose out of the same activity, since the offenses had been committed against two different sovereigns.

In conclusion, this Court is convinced that the result of the granting of defendants' motion at this time would be a blow to *stare decisis* and the entire state-federal dichoto-

mous system of criminal justice which this [9] Court has neither the authority nor the inclination to strike.

The Court, finding no merit in any of defendants' arguments, hereby denies all motions to quash the indictments.

Counsel will submit an appropriate order.

I, Louis S. Finkel, Official Court Reporter, do hereby certify that the foregoing is a true and accurate transcript of my original stenographic notes taken in the above matter to the best of my knowledge and ability.

/s/ Louis S. Finkel

APPENDIX C

ORDER OF
SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

Order

This matter having been duly presented to the Court, it is hereby Ordered as follows:

Motion for Leave to
Appeal: Denied

For the Court:

/s/ Victor S. Kilkenny,
P.J.A.D.

ORDER OF
SUPERIOR COURT OF NEW JERSEY,

M-166 September Term, 1969

This matter having been duly presented to the Court, it is Ordered that motion for Leave to Appeal is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this twenty-second day of March, 1971.

APPENDIX D

The Indictments

FEDERAL	STATE
UNITED STATES OF AMERICA v. WALTER ZIRPOLO, ROBERT E. JACKS, COLONIAL PIPELINE COMPANY, KARL T. FELDMAN, GLENN H. GILES, BEN D. LEUTY, ROWLAND TOMPKINS CORPORATION, BECHTEL CORPORATION, GATES CONSTRUCTION CORPORATION, GATES EQUIPMENT CORPORATION, *Defendants.*	THE STATE OF NEW JERSEY v. WALTER ZIRPOLO, ROBERT E. JACKS, COLONIAL PIPELINE COMPANY, KARL T. FELDMAN, BEN D. LEUTY, ROWLAND TOMPKINS CORPORATION, BECHTEL CORPORATION, GATES CONSTRUCTION CORPORATION, GATES EQUIPMENT CORPORATION, *Defendants.*
The Grand Jury in and for the District of New Jersey charges:	THE GRAND JURORS of the State of New Jersey, for the County of Middlesex, upon their oaths, PRESENT THAT:
1. The defendant, Walter Zirpolo, was, at all times mentioned in this Indictment, Mayor of the Township of Woodbridge, New Jersey, and a voting member of the Planning Board of said Township.	1. The defendant, WALTER ZIRPOLO, was, at all times mentioned in this Indictment, Mayor of the Township of Woodbridge, New Jersey, and a voting member of the Planning Board of said Township.
2. The defendant, Robert E. Jacks, was, at all times mentioned in this Indictment, prior to January 1, 1964, the Committeeman representing the Third Ward of the Township of Woodbridge, New Jersey, and a voting member of the Township Committee of said Township; and was, at all times mentioned in this Indictment, subsequent to January 1, 1964, a voting member and President of the Municipal Council of the Township of Woodbridge, New Jersey; and was, at all times mentioned in this Indictment, the owner of Metro Motors, a	2. The defendant, ROBERT E. JACKS, was, at all times mentioned in this Indictment, prior to January 1, 1964, the Committeeman representing the Third Ward of the Township of Woodbridge, New Jersey, and a voting member of the Township Committee of said Township; and was, at all times mentioned in this Indictment, subsequent to January 1, 1964, a voting member and President of the Municipal Council of the Township of Woodbridge, New Jersey; and was, at all times mentioned in this Indictment, the owner of Metro Motors, a

FEDERAL	STATE
single proprietorship, located at 561 Amboy Avenue, Township of Woodbridge, New Jersey.	single proprietorship, located at 561 Amboy Avenue, Township of Woodbridge, New Jersey.
3. The defendant Colonial Pipeline Company, was, at all times mentioned in this Indictment, a corporation duly incorporated under the laws of the State of Delaware, with principal offices at 3390 Peachtree Road, N.E., Atlanta, Georgia.	3. The defendant, COLONIAL PIPELINE COMPANY, was, at all times mentioned in this Indictment, a corporation duly incorporated under the laws of the State of Delaware, with principal offices at 3390 Peachtree Road, N.E., Atlanta, Georgia.
4. The defendant, Karl T. Feldman, was, at all times mentioned in this Indictment, Executive Vice President of the defendant Colonial Pipeline Company.	4. The defendant, KARL T. FELDMAN, was at all times mentioned in this Indictment, Executive Vice President of the defendant COLONIAL PIPELINE COMPANY.
5. The defendant, Glenn H. Giles, was, at all times mentioned in this Indictment, Manager of Construction for the defendant Colonial Pipeline Company.	5. GLENN H. GILES, an unindicted co-conspirator, at all times mentioned in this Indictment, was Manager of Construction for the defendant COLONIAL PIPELINE COMPANY.
6. The defendant, Ben D. Leuty, was, at all times mentioned in this Indictment, President of the defendant Colonial Pipeline Company.	6. The defendant, BEN D. LEUTY, was, at all times mentioned in this Indictment, President of the defendant COLONIAL PIPELINE COMPANY.
7. The defendant, Rowland Tompkins Corporation, was, at all times mentioned in this Indictment, prior to August 1, 1964, known as Rowland Tompkins & Sons, Inc., and since August 1, 1964, as the Rowland Tompkins Corporation, a corporation duly incorporated under the laws of the State of New York and located at 50 Broadway, Hawthorne, New York.	7. The Defendant, ROWLAND TOMPKINS CORPORATION, was, at all times mentioned in this Indictment prior to August 1, 1964, known as ROWLAND TOMPKINS & SONS, INC., and since August 1, 1964, as the ROWLAND TOMPKINS CORPORATION, a corporation duly incorporated under the laws of the State of New York and located at 50 Broadway, Hawthorne, New York.
8. Howard Tompkins, an unindicted co-conspirator, was, at all times mentioned in this Indictment, Vice President of the defendant Rowland Tompkins Corporation.	8. HOWARD TOMPKINS, an unindicted co-conspirator, was, at all times mentioned in this Indictment, President of the defendant ROWLAND TOMPKINS CORPORATION.

FEDERAL	STATE
9. Ralph A. Bankes, an unindicted co-conspirator, was, at all times mentioned in this Indictment, Vice President of the defendant Rowland Tompkins Corporation.	9. RALPH A. BANKES, an unindicted co-conspirator, was, at all times mentioned in this Indictment, Vice President of the defendant ROWLAND TOMPKINS CORPORATION.
10. The defendant, Bechtel Corporation, was, at all times mentioned in this Indictment, a corporation duly incorporated under the laws of the State of Delaware with principal offices at 220 Bush Street, San Francisco, California.	10. The defendant, BECHTEL CORPORATION, was, at all times mentioned in this Indictment, a corporation duly incorporated under the laws of the State of Delaware with principal offices at 220 Bush Street, San Francisco, California.
11. Harry F. Waste an unindicted co-conspirator, was, at all times mentioned in this Indictment, a Vice President of the Bechtel Corporation.	11. HARRY F. WASTE, an unindicted co-conspirator, was, at all times mentioned in this Indictment, a Vice President of the BECHTEL CORPORATION.
12. Robert L. Bowman, an unindicted co-conspirator, was, at all times mentioned in this Indictment, an employee of the Bechtel Corporation, employed in the capacity of Manager of Construction for the Pipeline Division.	12. ROBERT L. BOWMAN, an unindicted co-conspirator, was, at all times mentioned in this Indictment, an employee of the BECHTEL CORPORATION, employed in the capacity of Manager of Construction for the Pipeline Division.
13. William L. J. Fallow, an unindicted co-conspirator, was, at all times mentioned in this Indictment an employee of the Bechtel Corporation.	13. WILLIAM L. J. FALLOW, an unindicted co-conspirator, was, at all times mentioned in this Indictment, an employee of the BECHTEL CORPORATION.
14. The defendant, Gates Construction Corporation, was, at all times mentioned in this Indictment, a corporation duly incorporated under the laws of the State of New Jersey and located at foot of Industrial Avenue, Little Ferry, New Jersey.	14. The defendant, GATES CONSTRUCTION CORPORATION, was, at all times mentioned in this Indictment, a corporation duly incorporated under the laws of the State of New Jersey and located at the foot of Industrial Avenue, Little Ferry, New Jersey.
—15. The defendant Gates Equipment Corporation, was, at all times	15. The defendant, GATES EQUIPMENT CORPORATION, was, at all times

FEDERAL

mentioned in this Indictment, a corporation duly incorporated under the laws of the State of New Jersey and located at foot of Industrial Avenue, Little Ferry, New Jersey.

16. Robert S. Gates, an unindicted co-conspirator, was, at all times mentioned in this Indictment, President of the defendants Gates Construction Corporation and Gates Equipment Corporation.

COUNT I

That commencing on or about January 1, 1963, and continuously thereafter up to on or about December 31, 1964, the exact dates being to the Grand Jurors unknown, in the District of New Jersey, and elsewhere, the defendants herein:

Walter Zirpolo
Robert E. Jacks
Colonial Pipeline Company
Glenn H. Giles
Karl T. Feldman
Ben D. Leuty
Rowland Tompkins Corporation

and the following co-conspirators, not named as defendants herein:

Howard Tompkins
Ralph A. Bankes

did knowingly, willfully and unlawfully combine, conspire, confederate and agree with each other, a representative of the defendant Rowland Tompkins Corporation, and with divers other persons unknown to the

STATE

mentioned in this Indictment, a corporation duly incorporated under the laws of the State of New Jersey and located at the foot of Industrial Avenue, Little Ferry, New Jersey.

16. ROBERT S. GATES, an unindicted co-conspirator, was, at all times mentioned in this Indictment, President of the defendants GATES CONSTRUCTION CORPORATION and GATES EQUIPMENT CORPORATION.

COUNT I

That commencing on or about January 1, 1963, and continuously thereafter up to on or about December 31, 1964, in the County of Middlesex, State of New Jersey, and elsewhere and within the jurisdiction of this Court, the defendants herein:

WALTER ZIRPOLO
ROBERT E. JACKS
COLONIAL PIPELINE COMPANY
KARL T. FELDMAN
BEN T. LEUTY
ROWLAND TOMPKINS CORPORATION

and the following co-conspirators, not named as defendants herein:

GLENN H. GILES
HOWARD TOMPKINS
RALPH A. BANKES

did knowingly, willfully and unlawfully combine, conspire, confederate and agree with each other, a representative of the defendant ROWLAND TOMPKINS CORPORATION, and with divers other persons to commit certain

FEDERAL	STATE
Grand Jurors to commit certain offenses against the United States in violation of the provisions of Section 1952 of Title 16, [SIC], United States Code in that the defendants and said co-conspirators would travel and wilfully cause others to travel in interstate commerce and that they would use and wilfully cause others to use facilities in interstate commerce, including telephones and the mails, all of the above with the intent to promote, manage, establish and carry on and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the obtaining of a building permit by bribery of officials of the Township of Woodbridge, New Jersey, in violation of the laws of the State of New Jersey, and specifically in violation of N.J.S. 2A :93-6, and it was further part of said conspiracy that the defendants would thereafter perform and cause others to perform acts of promoting, managing, establishing and carrying on of said unlawful activity and acts facilitating the promoting, managing, establishing and carrying on of said unlawful activity.	offenses against the State of New Jersey in violation of N.J.S. 2A :93-6, in that the defendant, a representative of ROWLAND TOMPKINS CORPORATION and said co-conspirators did conspire to promote, manage, establish and carry on and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the obtaining of a building permit and certificate of occupancy by bribery of officials of the Township of Woodbridge, New Jersey, in violation of the laws of the State of New Jersey, and specifically in violation of N.J.S. 2A :93-6, and it was further part of said conspiracy that the defendants would thereafter perform and cause others to perform acts of promoting, managing, establishing and carrying on of said unlawful activity and acts facilitating the promoting, managing, establishing and carrying on of said unlawful activity.
It was part of said conspiracy that the defendant Colonial Pipeline Company would request the assistance of the defendant Walter Zirpolo in obtaining a building permit from the Township of Woodbridge, New Jersey, for erection of 22 petroleum storage tanks within the Third Ward of the Port Reading Section of said Township.	It was part of said conspiracy that the defendant COLONIAL PIPELINE COMPANY did request the assistance of the defendant WALTER ZIRPOLO, in obtaining a building permit from the Township of Woodbridge, New Jersey, for erection of 22 petroleum storage tanks and terminals within the Third Ward of the Port Reading Section of said Township.

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It was also a part of said conspiracy that the defendant Walter Zirpolo would inform the defendant Colonial Pipeline Company that its application for a building permit would be opposed by the residents of the Third Ward, Port Reading Section, Township of Woodbridge, New Jersey, and that the defendant Colonial Pipeline Company would agree not to file its application for a building permit for its proposed petroleum tank construction until after the November 5, 1963 elections in which the defendant Walter Zirpolo was a candidate for re-election as Mayor of the Township of Woodbridge as the defendants Walter Zirpolo and Robert E. Jacks had promised their constituents that no additional petroleum tanks would be erected in the Port Reading Section of Woodbridge, New Jersey.	It was also a part of said conspiracy that the defendant WALTER ZIRPOLO did inform the defendant COLONIAL PIPELINE COMPANY that its application for a building permit would be opposed by the residents of the Third Ward, Port Reading Section, Township of Woodbridge, New Jersey, and that the defendant COLONIAL PIPELINE COMPANY would agree not to file its application for a building permit for its proposed petroleum tank construction and terminal until after the November 5, 1963 elections in which the defendant WALTER ZIRPOLO was a candidate for re-election as Mayor of the Township of Woodbridge, as the defendants WALTER ZIRPOLO and ROBERT E. JACKS had promised their constituents that no additional petroleum tanks would be erected in the Port Reading Section of Woodbridge, New Jersey.
It was also a part of said conspiracy that the defendant Walter Zirpolo would arrange for the defendant Colonial Pipeline Company's agent and employee Fred Stewart to meet with the defendant Robert E. Jacks at the defendant Robert E. Jacks' place of business, Metro Motors, Woodbridge, New Jersey, at which time and place the said defendant Robert E. Jacks would inform Fred Stewart that the then present administration in the Township of Woodbridge, New Jersey, could if re-elected aid the defendant Colonial Pipeline Company in securing a building permit for its	It was also a part of said conspiracy that the defendant WALTER ZIRPOLO on behalf of himself and ROBERT E. JACKS did arrange for the defendant COLONIAL PIPELINE COMPANY'S Agent and employee Fred Stewart to meet with the defendant ROBERT E. JACKS at the defendant ROBERT E. JACKS' place of business, Metro Motors, Woodbridge, New Jersey, at which time and place the said defendant ROBERT E. JACKS did inform Fred Stewart that the then present administration in the Township of Woodbridge, New Jersey, could if re-elected aid the defendant COLONIAL PIPELINE COMPANY in securing

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proposed petroleum tankage construction in the Port Reading Section of said Township after the November 5, 1963 elections, without which aid the defendant Colonial Pipeline Company's building application might be defeated because of opposition by the residents of the Port Reading Section at a public hearing before the Planning Board of the Township of Woodbridge, New Jersey.	a building permit for its proposed petroleum tankage construction in the Port Reading Section of said Township after the November 5, 1963 elections, without which aid the defendant COLONIAL PIPELINE COMPANY'S building application might be defendant COLONIAL PIPELINE COMPANY'S building application might be defeated because of opposition by the residents of the Port Reading Section at a public hearing before the Planning Board of the Township of Woodbridge, New Jersey.
It was also a part of said conspiracy that the defendant Robert E. Jacks would on behalf of himself, the defendant Walter Zirpolo, and divers other persons to the Grand Jury unknown, solicit from the defendant Colonial Pipeline Company, through its agent and employee Fred Stewart, the sum of $50,000 as a campaign contribution in return for aiding the defendant Colonial Pipeline Company, after the November 5, 1963 elections, in securing a building permit from the Township of Woodbridge, New Jersey, over the objections of the residents of the Port Reading Section of the Township of Woodbridge, New Jersey.	It was also a part of said conspiracy that the defendant ROBERT E. JACKS did on behalf of himself and the defendant WALTER ZIRPOLO, solicit from the defendant COLONIAL PIPELINE COMPANY, through its agent and employee Fred Stewart, the sum of $50,000.00 under the guise of a campaign contribution in return for aiding the defendant COLONIAL PIPELINE COMPANY, after the November 5, 1963 elections, in securing a building permit and certificate of occupancy from the Township of Woodbridge, New Jersey, over the objecjections of the residents of the Port Reading Section of the Township of Woodbridge, New Jersey.
It was also a part of the said conspiracy that the defendants Glenn H. Giles, Karl T. Feldman and Ben D. Leuty, acting for and on behalf of the defendant Colonial Pipeline Company, would confer and agree among themselves, and with other persons to the Grand Jury unknown, to transmit the sum of $50,000 from	It was also a part of the said conspiracy that GLENN H. GILES, an unindicted co-conspirator and defendants KARL T. FELDMAN and BEN D. LEUTY, acting for and on behalf of the defendant COLONIAL PIPELINE COMPANY, would confer and agree among themselves, and with other persons to transmit the sum of $50,000.00

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the defendant Colonial Pipeline Company, in Atlanta, Georgia to the defendants Walter Zirpolo and Robert E. Jacks in the Township of Woodbridge, New Jersey, and other persons to the Grand Jury unknown, for the purpose of procuring the assistance of said defendants Walter Zirpolo and Robert E. Jacks in obtaining the aforesaid building permit from the Towsnhip of Woodbridge, New Jersey.	from the defendant COLONIAL PIPELINE COMPANY, in Atlanta, Georgia to the defendants WALTER ZIRPOLO and ROBERT E. JACKS in the Township of Woodbridge, New Jersey, for the purpose of procuring the assistance of said defendants WALTER ZIRPOLO and ROBERT E. JACKS in obtaining the aforesaid building permit and certificate of occupancy from the Township of Woodbridge, New Jersey.
It was also a part of said conspiracy that the defendant Colonial Pipeline Company, Glenn H. Giles, Karl T. Feldman, Ben D. Leuty, Rowland Tompkins Corporation, Walter Zirpolo and Robert E. Jacks, and the co-conspirators but not defendants herein, Howard Tompkins and Ralph A. Bankes and a representative of the defendant Rowland Tompkins Corporation would agree among themselves, and with divers other persons to the Grand Jury unknown, to travel and cause travel in interstate commerce, and to use and cause the use of facilities in interstate commerce, including the mails and the telephones, for the purpose of transmitting the aforesaid $50,000 from the defendant Colonial Pipeline Company's office in Atlanta, Georgia, to the defendant Rowland Tompkins Corporation's office in the City of Hawthorne, New York, and thence to the defendant Walter Zirpolo and Robert E. Jacks in the Township of Woodbridge, New Jersey, in three installments; that the first payment of $20,000 would be due on or about	It was also a part of said conspiracy that GLENN H. GILES, an unindicted co-conspirator and the defendants COLONIAL PIPELINE COMPANY, KARL T. FELDMAN, BEN D. LEUTY, ROWLAND TOMPKINS CORPORATION, WALTER ZIRPOLO and ROBERT E. JACKS, and the co-conspirators but not defendants, herein, HOWARD TOMPKINS and RALPH A. BANKES and a representative of the defendant ROWLAND TOMPKINS CORPORATION would agree among themselves, and with divers other persons to transmit the aforesaid $50,000.00 from the defendant COLONIAL PIPELINE COMPANY's office in Atlanta, Georgia to the defendant ROWLAND TOMPKINS CORPORATION's office in the City of Hawthorne, New York, and thence to the defendants WALTER ZIRPOLO and ROBERT E. JACKS, in the Township of Woodbridge, New Jersey, in three installments; that the first payment of $20,000.00 would be due on or about November 6, 1963; that the second payment of $15,000.00 would be due after a building permit had been issued to the defendant COLONIAL

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November 6, 1963; that the second payment of $15,000 would be due after a building permit had been issued to the defendant Colonial Pipeline Company by the Township of Woodbridge; that the third payment of $15,000 would be due after a certificate of occupancy had been issued to the defendant Colonial Pipeline Company by the Township of Woodbridge, New Jersey.	PIPELINE COMPANY by the Township of Woodbridge; that the third payment of $15,000.00 would be due after a certificate of occupancy had been issued to the defendant COLONIAL PIPELINE COMPANY by the Township of Woodbridge, New Jersey.
It was further part of said conspiracy that the defendants would make and cause to be made false and fictitious documents and would perform other acts for the purpose of hiding and concealing, and causing to be hidden and concealed, the purpose of, and acts in furtherance of, the conspiracy, all in violation of Section 371 of Title 18, United States Code.	It was further part of said conspiracy that the defendants would make and cause to be made false and fictitious documents and would perform other acts for the purpose of hiding and concealing, and causing to be hidden and concealed, the purpose of, and acts in furtherance of, the conspiracy, all in violation of and contrary to provisions of N.J.S. 2A:98-1 and 2A:93-6 and against thepeach [SIC] of this State, the government and dignity of the same.
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OVERT ACTS	OVERT ACTS
In furtherance of the conspiracy and to effect the objects thereof the defendants committed and caused to be committed the following overt acts:	In furtherance of the conspiracy and to effect the objects thereof the defendants committed and caused to be committed the following overt acts:
1. On or about August 16, 1963, in Woodbridge, New Jersey, in the District of New Jersey the defendant Walter Zirpolo had a conversation with Fred Stewart, an employee of the defendant Colonial Pipeline Company.	1. On or about August 16, 1963, in the Township of Woodbridge, County of Middlesex, State of New Jersey and within the jurisdiction of this Court, the defendant WALTER ZIRPOLO had a conversation with Fred Stewart, an employee of the defendant COLONIAL PIPELINE COMPANY.

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2. On or about August 16, 1963, in Woodbridge, New Jersey, in the District of New Jersey, the defendant Robert E. Jacks had a conversation with Fred Stewart, an employee of the defendant Colonial Pipeline Company.	2. On or about August 16, 1963, in the Township of Woodbridge, County of Middlesex, State of New Jersey and within the jurisdiction of this Court, the defendant ROBERT E. JACKS had a conversation with Fred Stewart, an employee of the defendant COLONIAL PIPELINE COMPANY.
3. On or about October 14 and 15, 1963, in Atlanta, Georgia, the defendants Glenn H. Giles and Karl T. Feldman had a conversation with a representative of the defendant Rowland Tompkins Corporation at the defendant Colonial Pipeline Company's offices in Atlanta, Georgia.	3. On or about October 14 and 15, 1963, in Atlanta, Georgia, GLENN H. GILES, an unindicted co-conspirator, had a conversation with a representative of the defendant ROWLAND TOMPKINS CORPORATION at the defendant COLONIAL PIPELINE COMPANY's offices in Atlanta, Georgia.
4. On or about October 14 and 15, 1963, at the defendant Colonial Pipeline Company's offices in Atlanta, Georgia, the defendant Karl T. Feldman signed a document dated October 1, 1963, which document purported to be a contract between the defendant Colonial Pipeline Company and the defendant Rowland Tompkins Corporation.	4. On or about October 14 and 15, 1963, at the defendant COLONIAL PIPELINE COMPANY's offices in Atlanta, Georgia, the defendant KARL T. FELDMAN signed a document dated October 1, 1963, which document purported to be a contract between the defendant COLONIAL PIPELINE COMPANY and the defendant ROWLAND TOMPKINS CORPORATION.
5. On or about October 15, 1963, the defendants Karl T. Feldman, Glenn H. Giles and Ben D. Leuty caused a representative of the defendant Rowland Tompkins Corporation to travel in interstate commerce from Atlanta, Georgia to Newark, New Jersey, in the District of New Jersey.	5. On or about October 15, 1963, GLENN H. GILES, an unindicted co-conspirator and the defendants KARL T. FELDMAN and BEN D. LEUTY caused a representative of the defendant ROWLAND TOMPKINS CORPORATION to travel from Atlanta, Georgia to Newark, New Jersey.
6. On or about October 31, 1963, the defendants Karl T. Feldman, Glenn H. Giles and Ben D. Leuty caused a representative of the defendant Rowland Tompkins Corpora-	6. On or about October 31, 1963 GLENN H. GILES an unindicted co-conspirator and the defendants KARL T. FELDMAN and BEN D. LEUTY caused a representative of the defend-

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tion to mail a false and fraudulent invoice from the defendant Rowland Tompkins Corporation office [SIC] in Hawthorne, New York, to the defendant Colonial Pipeline Company in Atlanta, Georgia.	ant ROWLAND TOMPKINS CORPORATION to mail a false and fraudulent invoice from the defendant ROWLAND TOMPKINS CORPORATION office in Hawthorne, New York to the defendant COLONIAL PIPELINE COMPANY in Atlanta, Georgia.
7. On or about November 1, 1963, the defendants Glenn H. Giles, Karl T. Feldman and Ben D. Leuty, at the defendant Colonial Pipeline Company's offices in Atlanta, Georgia, used, and caused others to use, an interstate facility, to wit, the United States mails, to transmit the defendant Colonial Pipeline Company's check in the amount of $20,000 to the defendant Rowland Tompkins Corporation office at Hawthorne, New York.	7. On or about November 1, 1963, GLENN H. GILES, an unindicted coconspirator and the defendants KARL T. FELDMAN and BEN D. LEUTY, at the defendant COLONIAL PIPELINE COMPANY's offices in Atlanta, Georgia, did and caused others to transmit the defendant COLONIAL PIPELINE COMPANY'S check in the amount of $20,000.00 to the defendant ROWLAND TOMPKINS CORPORATION office at Hawthorne, New York.
8. On or about November 7, 1963, the defendants Robert E. Jacks, Walter Zirpolo, Karl T. Feldman, Glenn H. Giles, and Ben D. Leuty caused a representative of the defendant Rowland Tompkins Corporation and Howard Tompkins to travel and transport in intertate commerce between Briarcliff Manor, New York and Woodbridge, New Jersey, in the District of New Jersey, the sum of $20,000 in United States currency.	8. On or about November 7, 1963, GLENN H. GILES, an unindicted coconspirator and the defendants ROBERT E. JACKS, WALTER ZIRPOLO, KARL T. FELDMAN and BEN D. LEUTY caused a representative of the defendant ROWLAND TOMPKINS CORPORATION and HOWARD TOMPKINS to travel, transport and transmit between Briarcliff Manor, New York and Woodbridge, New Jersey, County of Middlesex, State of New Jersey and within the jurisdiction of this Court, the sum of $20,000.00 in United States currency.
9. On or about November 7, 1963, in Woodbridge, New Jersey, in the District of New Jersey, the defendant Robert E. Jacks received the sum of $20,000 in United States currency	9. On or about November 7, 1963, in the Township of Woodbridge, County of Middlesex, State of New Jersey and within the jurisdiction of this Court, the defendant ROBERT E.

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from a representative of the defendant Rowland Tompkins Corporation.	JACKS on behalf of himself and the defendant WALTER ZIRPOLO received the sum of $20,000.00 in United States currency from a representative of the defendant ROWLAND TOMPKINS CORPORATION.
10. On or about December 6, 1963, the defendants Karl .T. Feldman, Glenn H. Giles and Ben D. Leuty at the defendant Colonial Pipeline Company's offices in Atlanta, Georgia, used, and caused others to use, an interstate facility, to wit, the United States mails, to transmit the defendant Colonial Pipeline Company's check in the amount of $15,000 to the defendant Rowland Tompkins Corporation office at Hawthorne, New York.	10. On or about December 6, 1963, GLENN H. GILES an unindicted co-conspirator and the defendants KARL T. FELDMAN and BEN D. LEUTY at the defendant COLONIAL PIPELINE COMPANY'S offices in Atlanta, Georgia transmitted the defendant COLONIAL PIPELINE COMPANY'S check in the amount of $15,000.00 to the defendant ROWLAND TOMPKINS CORPORATION office at Hawthorne, New York.
11. On or about December 13, 1963, the defendants Robert E. Jacks, Walter Zirpolo, Karl T. Feldman, Glenn H. Giles and Ben D. Leuty caused a representative of the defendant Rowland Tompkins Corporation and Ralph A. Bankes to travel and transport in interstate commerce between Hawthorne, New York and Woodbridge, New Jersey, in the District of New Jersey, the sum of $15,000 in United States curreney.	11. On or about December 13, 1963, GLENN H. GILES, an unindicted co-conspirator and defendants ROBERT E. JACKS, WALTER ZIRPOLO, KARL T. FELDMAN and BEN D. LEUTY caused a representative of the defendant ROWLAND TOMPKINS CORPORATION and RALPH A. BANKES to travel, transport and transmit between Hawthorne, New York and the Township of Woodbridge, County of Middlesex, State of New Jersey and within the jurisdiction of this Court, the sum of $15,000.00 in United States currency.
12. On or about December 13, 1963, in Woodbridge, New Jersey, in the District of New Jersey, the defendant Robert E. Jacks had a conversation with a representative of the defendant Rowland Tompkins Corporation.	12. On or about December 13, 1963, in the Township of Woodbridge, County of Middlesex, and the jurisdiction of this Court, the defendant ROBERT E. JACKS had a conversation with a representative of the defendant ROWLAND TOMPKINS CORPORATION.

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13. Between on or about December 15, 1963, and December 26, 1963, the defendant Glenn H. Giles in Atlanta, Georgia, did use an interstate facility, to wit, a telephone, to have a conversation with Fred Stewart in the State of New Jersey, in the District of New Jersey.	13. Between on or about December 15, 1963 and December 26, 1963, GLENN H. GILES an unindicted co-conspirator, in Atlanta, Georgia had a conversation with Fred Stewart in the State of New Jersey.
14. On or about February 6, 1964 the defendants Robert E. Jacks, Walter Zirpolo, Karl T. Feldman, Glenn H. Giles, and Ben D. Leuty caused a representative of the defendant Rowland Tompkins Corporation and Ralph A. Bankes to travel and transport in interstate commerce between Hawthorne, New York and Woodbridge, New Jersey, in the District of New Jersey, the sum of $15,000 in United States currency.	14. On or about February 6, 1964, GLENN H. GILES an unindicted co-conspirator and the defendants ROBERT E. JACKS, WALTER ZIRPOLO, KARL T. FELDMAN and BEN D. LEUTY caused a representative of the defendant ROWLAND TOMPKINS CORPORATION and RALPH A. BANKES to travel, transport and transmit between Hawthorne, New York and the Township of Woodbridge, County of Middlesex, State of New Jersey and within the jurisdiction of this Court, the sum of $15,000.00 in United States currency.
15. On or about February 6, 1964, in Woodbridge, New Jersey, in the District of New Jersey, the defendant Robert E. Jacks received the sum of $15,000 in United States currency from a representative of the defendant Rowland Tompkins Corporation.	15. On or about February 6, 1964, in the Township of Woodbridge, County of Middlesex, State of New Jersey and within the jurisdiction of this Court, the defendant ROBERT E. JACKS, on behalf of himself and the defendant WALTER ZIRPOLO received the sum of $15,000.00 in United States currency from a representative of the defendant ROWLAND TOMPKINS CORPORATION.
16. Between on or about October 30, 1964, and November 27, 1964, the defendants Karl T. Feldman, Glenn H. Giles and Ben D. Leuty at the defendant Colonial Pipeline Company's offices in Atlanta, Georgia, used, and caused others to use, an interstate fa-	16. Between on or about October 30, 1964, and November 27, 1964 GLENN H. GILES, an unindicted co-conspirator and the defendants KARL T. FELDMAN and BEN D. LEUTY, at [redacted] defendant COLONIAL PIPELINE COMPANY'S offices in Atlanta, Georgia

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cility, to wit, the United States mails, to transmit the defendant Colonial Pipeline Company's check in the amount of $15,062.19 to the defendant Rowland Tompkins Corporation office in Hawthorne, New York.	transmitted the defendant COLONIAL PIPELINE COMPANY's check in the amount of $15,062.19 to the defendant ROWLAND TOMPKINS CORPORATION office at Hawthorne, New York.
17. On or about November 27, 1964, Ralph A. Bankes at Hawthorne, New York, used an interstate facility, to wit, the telephone to hold a conversation with the defendant Robert E. Jacks who was then in Woodbridge, New Jersey, in the District of New Jersey.	17. On or about November 27, 1964 RALPH A. BANKES at Hawthorne, New York had a conversation with the defendant ROBERT E. JACKS who was then in the Township of Woodbridge, County of Middlesex, State of New Jersey and the jurisdiction of this Court.
18. On or about November 27, 1964, the defendants Robert E. Jacks, Walter Zirpolo, Karl T. Feldman, Glenn H. Giles and Ben D. Leuty caused Ralph A. Bankes and Howard Tompkins to travel and transport in interstate commerce between Briarcliff Manor, New York [sic] and Edison, New Jersey, in the District of New Jersey, the sum of $15,000 in United States currency.	18. On or about November 27, 1964 GLENN H. GILES, an unindicted co-conspirator and the defendants ROBERT E. JACKS, WALTER ZIRPOLO, KARL T. FELDMAN and BEN D. LEUTY caused RALPH A. BANKES and HOWARD TOMPKINS to travel and transport between Briarcliff Manor, New York and the Township of Edison, County of Middlesex, State of New Jersey and within the jurisdiction of this Court the sum of $15,000.00 in United States curreney.
19. On or about November 27, 1964, in Edison, New Jersey, in the District of New Jersey, the defendant Robert E. Jacks received the sum of $15,000 in United States currency from Ralph A. Bankes.	19. On or about November 27, 1964, in the Township of Edison, County of Middlesex, State of New Jersey, and within the jurisdiction of this Court the defendant ROBERT E. JACKS individually and on behalf of defendant WALTER ZIRPOLO received the sum of $15,000.00 in United States currency from RALPH A. BANKES, contrary to provisions of N.J.S. 2A :98-1 and 2A :93-6 and against the peace of this

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	State, the Government and dignity of the same.
All of the above in violation of Section 371, Title 18, United States Code.	
COUNT II.	
That Walter Zirpolo, Robert E. Jacks, Colonial Pipeline Company, Karl T. Feldman, Glenn H. Giles, Ben D. Leuty and Rowland Tompkins Corporation, the defendants herein, did, on or about November 7, 1963, wilfully cause a representative of the defendant Rowland Tompkins Corporation and Howard Tompkins to travel in interstate commerce between Briarcliff Manor, New York and Woodbridge, New Jersey, in the District of New Jersey, and the defendants did cause said travel with intent to promote, manage, establish and carry on and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the obtaining of a building permit by bribery of officials of the Township of Woodbridge, New Jersey, in violation of the laws of the State of New Jersey, and specifically in violation of N.J.S. 2A:93-6, in that the defendants caused a representative of the defendant Rowland Tompkins Corporation and Howard Tompkins to travel and transport in interstate commerce a sum of money, to wit, $20,000 in United States currency, and that thereafter the defendants did perform and attempt to perform the acts of promoting, managing, establishing, and carrying on and facilitating the	

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promoting, managing, establishing, and carrying on of said unlawful activity, in that the defendants did cause a representative of the defendant Rowland Tompkins Corporation to deliver the aforesaid sum of money to the defendant Robert E. Jacks in Woodbridge, New Jersey, in the District of New Jersey, on or about November 7, 1963.

All of the above in volation of Sections 2 and 1952 of Title 18, United States Code.

COUNT III.

That Walter Zirpolo, Robert E. Jacks, Colonial Pipeline Company, Karl T. Feldman, Glenn H. Giles, Ben D. Leuty and Rowland Tompkins Corporation, the defendants herein, did, on or about December 13, 1963, wilfully cause a representative of the defendant Rowland Tompkins Corporation and Ralph A. Bankes to travel in interstate commerce between Hawthorne New York and Woodbridge, New Jersey, in the District of New Jersey, and the defendants did cause said travel with intent to promote, manage, establish, and carry on, and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the obtaining of a building permit by bribery of officials of the Township of Woodbridge, New Jersey in violation of the laws of the State of New Jersey, and specifically in violation of N.J.S. 2A :93-6, in that the said defendants caused a representative of the defendant Rowland

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Tompkins Corporation and Ralph A. Bankes to travel and transport in interstate commerce a sum of money, to wit, $15,000 in United States currency, and that thereafter the defendants did perform and attempt to perform the acts of promoting, managing, establishing, and carrying on and facilitating the promoting, managing, establishing and carrying on of said unlawful activity, in that the defendants did cause a representative of the defendant Rowland Tompkins Corporation to meet with the defendant Robert E. Jacks in Woodbridge, New Jersey, in the District of New Jersey, on or about December 13, 1963, for the purpose of attempting to deliver the aforesaid sum of money.

All of the above in violation of Sections 2 and 1952 of Title 18, United States Code.

COUNT IV.

That Walter Zirpolo, Robert E. Jacks, Colonial Pipeline Company, Karl T. Feldman, Glenn H. Giles, Ben D. Leuty and Rowland Tompkins Corporation, the defendants herein, did, on or about February 6, 1964, wilfully cause a representative of the defendant Rowland Tompkins Corporation and Ralph A. Bankes to travel in interstate commerce between Hawthorne New York and Woodbridge, New Jersey, in the District of New Jersey, and the defendants did cause said travel with intent to promote, manage, establish and carry on, and facilitate the promoting, manag-

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COUNT II.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further Present that KARL T. FELDMAN, BEN D. LEUTY, COLONIAL PIPELINE COMPANY and ROWLAND TOMPKINS CORPORATION, defendants herein, did on or about the 6th day of February 1964 in the Township of Woodbridge, County of Middlesex and within the jurisdiction of this Court, willfully, unlawfully and corruptly give and caused to be given the sum of $15,000.00 as a bribe to WALTER ZIRPOLO and ROBERT E. JACKS, also defendants herein, and at the same time and place the said WALTER ZIRPOLO

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ing, establishing, and carrying on of an unlawful activity, said unlawful activity being the obtaining of a building permit by bribery of officials of the Township of Woodbridge, New Jersey, in violation of the laws of the State of New Jersey, and specifically in violation of N.J.S. 2A:93-6, in that the said defendants caused a representative of the defendant Rowland Tompkins Corporation and Ralph A. Bankes to travel and transport in interstate commerce a sum of money, to wit, $15,000 in United States currency, and that thereafter the defendants did perform and attempt to perform the acts of promoting, managing, establishing, and carrying on and facilitating the promoting, managing, establishing and carrying on of said unlawful activity, in that the defendants did cause a representative of the defendant Rowland Tompkins Corporation to deliver the aforesaid sum of money to the defendant Robert E. Jacks, in Woodbridge, New Jersey, in the District of New Jersey, on or about February 6, 1964.

All of the above in violation of Sections 2 and 1952 of Title 18, United States Code.

and ROBERT E. JACKS did willfully, unlawfully and corruptly receive the sum of $15,000.00 as a bribe through an intermediary from the said defendants KARL T. FELDMAN, BEN D. LEUTY, COLONIAL PIPELINE COMPANY and ROWLAND TOMPKINS CORPORATION for the purpose of securing from the Township of Woodbridge, in which municipality WALTER ZIRPOLO was the Mayor and ROBERT E. JACKS was President of the Municipal Council, a building permit and certificate of occupancy for the erection of a tank farm and terminal on property owned by Colonial Pipeline Company, contrary to the provisions of N.J.S. 2A:96-3 and N.J.S. 2A:85-14, and against the peace of this State, the Government and dignity of the same.

COUNT V.

That Walter Zirpolo, Robert E. Jacks, Colonial Pipeline Company, Karl T. Feldman, Glenn H. Giles, Ben D. Leuty, and Rowland Tompkins Corporation, the defendants herein, did, on or about November 27, 1964, wilfully cause Howard Tompkins and

COUNT III.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further Present that KARL T. FELDMAN, BEN D. LEUTY, COLONIAL PIPELINE COMPANY and ROWLAND TOMPKINS CORPORATION, defendants herein, did on or about the 27th day of November,

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Ralph A. Bankes to travel in interstate commerce between Briarcliff Manor, New York and Edison, New Jersey, in the District of New Jersey, and the defendants did cause said travel with intent to promote, manage, establish and carry on, and facilitate the promoting, managing, establishing, and carrying on of an unlawful activity, said unlawful activity being the obtaining of a building permit by bribery of officials of the Township of Woodbridge, New Jersey in violation of the laws of the State of New Jersey; and specifically in violation of N.J.S. 2A:93-6, in that the said defendants caused Howard Tompkns and Ralph A. Bankes to travel and transport in interstate commerce the sum of $15,000 in United States currency, and that thereafter the defendants did perform and attempt to perform the acts of promoting, managing, establishing and carrying on and facilitating the promoting, establishing and carrying on of said unlawful activity, in that the defendants caused Ralph A. Bankes to deliver the aforesaid sum of money to the defendant Robert E. Jacks, in Edison, New Jersey, in the District of New Jersey, on or about November 27, 1964. All of the above in violation of Sections 2 and 1952 of Title 18, United States Code.	1964 in the Township of Edison, County of Middlesex and within the jurisdiction of this Court, willfully, unlawfully and corruptly give and cause to be given the sum of $15,000.00 as a bribe to WALTER ZIRPOLO and ROBERT E. JACKS, also defendants herein, and at the same time and place the said WALTER ZIRPOLO and ROBERT E. JACKS did willfully, unlawfully and corruptly receive the sum of $15,000.00 as a bribe through an intermediary from the said defendants KARL T. FELDMAN, BEN D. LEUTY, COLONIAL PIPELINE COMPANY, and ROWLAND TOMPKINS CORPORATION for the purpose of securing from the Township of Woodbridge, in which municipality WALTER ZIRPOLO was the Mayor and ROBERT E. JACKS was President of the Municipal Council, a building permit and certificate of occupancy for the erection of a tank farm and terminal on property owned by Colonial Pipeline Company, contrary to the provisions of N.J.S. 2A:96-3 and N.J.S. 2A:85-14, and against the peace of this State, the Government and dignity of the same.

FEDERAL	STATE
COUNT VI.	COUNT IV.
That commencing on or about January 1, 1964 and continuously thereafter up to on or about December 31, 1964, the exact dates to the Grand Jurors unknown, in the District of New Jersey, and elsewhere, the defendants herein: Walter Zirpolo Robert E. Jacks Colonial Pipeline Company Glenn H. Giles Karl T. Feldman Ben D. Leuty Bechtel Corporation Gates Construction Corporation Gates Equipment Corporation and the following co-conspirators, not named as defendants herein: Harry F. Waste Robert L. Bowman William L.J. Fallow Robert S. Gates did knowingly, wilfully and unlawfully combine, conspire, confederate and agree with each other and with divers other persons unknown to the Grand Jurors to commit certain offenses against the United States in violation of the provisions of Section 1952 of Title 18, United States Code, in that the defendants and said co-conspirators would travel, and wilfully cause others to travel, in interstate commerce, and that they would use, and wilfully cause others to use, facilities in interstate commerce, including telephones and the mails, all of the above with the intent to pro-	That commencing on or about January 1, 1964 and continuously thereafter up to on or about December 31, 1964, the exact dates to the Grand Jurors unknown, in the County of Middlesex, and State of New Jersey, and elsewhere, and within the jurisdiction of this Court; the following defendants: WALTER ZIRPOLO ROBERT E. JACKS COLONIAL PIPELINE COMPANY KARL T. FELDMAN BEN D. LEUTY BECHTEL CORPORATION GATES CONSTRUCTION CORPORATION GATES EQUIPMENT CORPORATION and the following co-conspirators, not named as defendants herein: GLENN H. GILES HARRY F. WASTE ROBERT L. BOWMAN WILLIAM L.J. FALLOW ROBERT S. GATES did knowingly, willfully and unlawfully combine, conspire, confederate and agree with each other and with divers other persons to commit certain offenses against the State of New Jersey in violation of the provisions of N.J.S. 2A:93-6, in that the defendants and said co-conspirators, did conspire to promote, manage, establish and carry on and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the obtaining of easements and street cross-

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mote, manage, establish and carry on and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the obtaining of easements by bribery of officials of the Township of Woodbridge, New Jersey in violation of the laws of the State of New Jersey, and specifically in violation of N.J.S. 2A:93-6, and it was further part of said conspiracy that the defendants would thereafter perform, and cause others to perform acts, of promoting, managing, establishing and carrying on of said unlawful activity, and acts facilitating the promoting, managing, establishing and carrying on of said unlawful activity.	ings by bribery of officials of the Township of Woodbridge, in the County of Middlesex and State of New Jersey, and it was further part of said conspiracy that the defendants would thereafter perform, and cause others to perform, acts of promoting, managing, establishing and carrying on of said unlawful activity, and acts facilitating the promoting, managing, establishing and carrying on of said unlawful activity.
It was a part of said conspiracy that the defendant Colonial Pipeline Company, acting through its agent and employee Fred Stewart, would solicit the advice and assistanee of the defendant Walter Zirpolo for the purpose of arranging the details of a proposed purchase of easements by the said defendant Colonial Pipeline Company for construction of its pipeline through property owned by the Township of Woodbridge, New Jersey.	It was a part of said conspiracy that the defendant COLONIAL PIPELINE COMPANY, acting through its agent and employee, Fred Stewart, would solicit the advice and assistance of the defendant WALTER ZIRPOLO for the purpose of arranging the details of a proposed purchase of easements and street crossings by the said defendant COLONIAL PIPELINE COMPANY for construction of its pipeline through and under streets and property owned by the Township of Woodbridge, New Jersey.
It was also part of said conspiracy that the defendant Walter Zirpolo would agree to meet with the defendant Colonial Pipeline Company's agent and employee, Fred Stewart, at the defendant Walter Zirpolo's offices at the Menlo Park Shopping Center, Edison, New Jersey, for the purpose of discussing the defendant	It was also a part of said conspiracy that the defendant WALTER ZIRPOLO would agree to meet with the defendant COLONIAL PIPELINE COMPANY'S Agent and employee, Fred Stewart, at the defendant WALTER ZIRPOLO'S offices at the Menlo Park Shopping Center, Edison, New Jersey, for the purpose of discussing the acquisition of the aforesaid easements and street crossings but that instead the defendant WALTER ZIRPOLO did arrange for Fred Stewart to meet at his aforesaid offices at the Menlo Park Shopping

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Colonial Pipeline Company's proposal to purchase the aforesaid easements, but that instead the defendant Walter Zirpolo would arrange for Fred Stewart to meet at his aforesaid offices at the Menlo Park Shopping Center with the defendant Robert E. Jacks who would on behalf of himself, the defendant Walter Zirpolo, and divers other persons to the Grand Jurors unknown, solicit from the defendant Colonial Pipeline Company, through its agent and employee Fred Stewart, the sum of $100,00 in violation of the aforesaid laws of the State of New Jersey as a condition for obtaining and securing the sale of easements by the Township of Woodbridge, New Jersey, to the defendant Colonial Pipeline Company.

It was also a part of said conspiracy that the defendants Glenn H. Giles, Karl T. Feldman and Ben D. Leuty, acting for and on behalf of the defendant Colonial Pipeline Company, would confer and agree among themselves, and with other persons to the Grand Jury unknown, to transmit the sum of $60,000 from the defendant Colonial Pipeline Company, in Atlanta, Georgia, to the defendants Walter Zirpolo and Robert E. Jacks in the Township of Woodbridge, New Jersey, and other persons to the Grand Jurors unknown, for the purpose of obtaining the assistance of said defendants Walter Zirpolo and Robert E. Jacks in obtaining and securing the sale of easements from the Township of Woodbridge, New Jersey, to the defendant Colonial Pipeline Company.

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Center with the defendant ROBERT E. JACKS who did on behalf of himself and the defendant WALTER ZIRPOLO, solicit from the defendant COLONIAL PIPELINE COMPANY, through its agent and employee Fred Stewart, the sum of $100,000.00 in violation of the aforesaid laws of the State of New Jersey as a condition for obtaining and securing the sale of easement rights and street crossings from the said Township of Woodbridge, New Jersey, to the defendant COLONIAL PIPELINE COMPANY.

It was also a part of said conspiracy that GLENN H. GILES, an unindicted co-conspirator and defendants KARL T. FELDMAN and BEN D. LEUTY, acting for and on behalf of the defendant COLONIAL PIPELINE COMPANY, did confer and agree among themselves, to transmit the sum of $60,000.00 from the defendant COLONIAL PIPELINE COMPANY, in Atlanta, Georgia, to the defendants WALTER ZIRPOLO and ROBERT E. JACKS in the Township of Edison, New Jersey for the purpose of obtaining the assistance of said defendants WALTER ZIRPOLO and ROBERT E. JACKS in obtaining and securing easement rights and street crossings from the Township of Woodbridge, New Jersey, to the defendant COLONIAL PIPELINE COMPANY.

It was also a part of said conspiracy that the defendants COLONIAL PIPELINE COMPANY, KARL T. FELDMAN, BEN D. LEUTY, BECHTEL CORPORATION, WALTER ZIRPOLO and ROBERT E. JACKS and the co-conspirators, but not defendants herein, HARRY F.

FEDERAL	STATE
It was also a part of said conspiracy that the defendants Colonial Pipeline Company, Glenn H. Giles, Karl T. Feldman, Ben D. Leuty, Bechtel Corporation, Walter Zirpolo, and Robert E. Jacks and the co-conspirators, but not defendants herein, Harry F. Waste, Robert L. Bowman and William L.J. Fallow, would agree among themselves and with divers other persons to the Grand Jurors unknown to travel and cause travel in interstate commerce and to use and cause the use of facilities in interstate commerce, including the mails and the telephones, for the purpose of arranging for the payment of $60,000 in United States currency from the defendant Bechtel Corporation, acting on behalf of the defendant Colonial Pipeline Company, to the defendants Walter Zirpolo and Robert E. Jacks in Edison, New Jersey in three separate payments of $20,000 for the purpose of obtaining and securing the sale of easements by the Township of Woodbridge, New Jersey, to the defendant Colonial Pipeline Company.	WASTE, ROBERT L. BOWMAN, WILLIAM L.J. FALLOW and GLENN H. GILES, did agree among themselves and with divers other persons to arrange for the payment of $60,000.00 in United States currency from the defendant BECHTEL CORPORATION, acting on behalf of the defendant COLONIAL PIPELINE COMPANY, to the defendants WALTER ZIRPOLO and ROBERT E. JACKS in Edison, New Jersey in three separate payments of $20,000 for the purpose of obtaining and securing the sale of easement rights and street crossings from the Township of Woodbridge, New Jersey, to the defendant COLONIAL PIPELINE COMPANY.
It was also a part of the conspiracy that the defendants Colonial Pipeline Company, Glenn H. Giles, Karl T. Feldman, Ben D. Leuty, Bechtel Corporation, Walter Zirpolo and Robert E. Jacks and the co-conspirators, but not defendants herein, Harry F. Waste, Robert L. Bowman and William L.J. Fallow would agree among themselves and with other persons to travel, and cause travel in interstate commerce, and to use, and cause the use of, facilities in interstate com-	It was also a part of the conspiracy that the defendants COLONIAL PIPELINE COMPANY, KARL T. FELDMAN, BEN D. LEUTY, BECHTEL CORPORATION, WALTER ZIRPOLO and ROBERT E. JACKS and the co-conspirators, but not defendants herein, HARRY F. WASTE, ROBERT L. BOWMAN, WILLIAM L.J. FALLOW and GLENN H. GILES did agree among themselves and with other persons to transmit the first payment of $20,000.00 in cash from the defendant BECHTEL CORPORATION's office in the State of New York to its office in the State of New Jersey, and thence to the defendants WALTER ZIRPOLO and ROBERT E. JACKS in Edison, New Jersey. It was also part of the conspiracy that the defendants, COLONIAL PIPELINE COMPANY, KARL T. FELDMAN, BEN D. LEUTY, GATES CONSTRUCTION CORPORATION, GATES EQUIPMENT COR-

FEDERAL	STATE

merce, including the mails and the telephones, for the purpose of transmitting the first payment of $20,000 in cash from the defendant Bechtel Corporation's office in the State of New York to its offices in the State of New Jersey, and thence to the defendants Walter Zirpolo and Robert E. Jacks in Edison, New Jersey.

It was also part of the conspiracy that the defendants, Colonial Pipeline Company, Glenn H. Giles, Karl T. Feldman, Ben D. Leuty, Gates Construction Corporation, Gates Equipment Corporation, Walter Zirpolo and Robert E. Jacks, and the co-conspirators, but not defendants herein, Robert S. Gates, Harry F. Waste and Robert L. Bowman, would agree among themselves, and with other persons to the Grand Jurors unknown, to travel and cause travel and to use and cause the use of facilities in interstate commerce, including the mails and the telephones, for the purpose of transmitting the sum of $84,800 in separate payments of $42,400, by means of false and fraudulent invoices, from the defendant Colonial Pipeline Company through the defendants Bechtel Corporation, Gates Construction Corporation and Gates Equipment Corporation for the purpose of transmitting $40,000 in separate payments of $20,000 each to the defendants Walter Zirpolo and Robert E. Jacks.

It was further part of said conspiracy that the defendants would make and cause to be made false and fictitious documents and would perPORATION, WALTER ZIRPOLO and ROBERT E. JACKS, and the co-conspirators, but not defendants herein, ROBERT S. GATES, HARRY F. WASTE and ROBERT L. BOWMAN and GLENN H. GILES did agree among themselves, and with other persons to transmit the sum of $84,800.00 in separate payments of $42,400.00 by means of false and fraudulent invoices, from the defendant COLONIAL PIPELINE COMPANY through the defendants BECHTEL CORPORATION, GATES CONSTRUCTION CORPORATION and GATES EQUIPMENT CORPORATION for the purpose of transmitting $40,000.00 in separate payments of $20,000.00 each to the defendants WALTER ZIRPOLO and ROBERT E. JACKS.

It was further part of said conspiracy that the defendants, the unindicted co-conspirators and the aforesaid corporations they represented did make and cause to be made false and fictitious documents and did perform other acts for the purpose of hiding and concealing, and causing to be hidden and concealed, the purposes of, and acts in furtherance of, the conspiracy, contrary to the provisions of N.J.S. 2A :98-1 and 2A :93-6 and against the peace of this State, the government and dignity of same.

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form other acts for the purpose of hiding and concealing, and causing to be hidden and concealed, the purpose of, and acts in furtherance of, the conspiracy, all in violation of Section 371 of Title 18, United States Code.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof the defendants committed, and caused to be committed, the following overt acts:

1. Between on or about February 12, 1964 and March 23, 1964, in Woodbridge, New Jersey, in the District of New Jersey, the defendant Walter Zirpolo had a telephone conversation with Fred Stewart, an employee of the defendant Colonial Pipeline Company.

2. On or about March 23, 1964, in Edison, New Jersey, in the District of New Jersey, the defendant Robert E. Jacks had a conversation with Fred Stewart, an employee of the defendant Colonial Pipeline Company.

3. On or about June 4, 1964, Harry F. Waste had a conversation with the defendant Karl T. Feldman at the defendant Colonial Pipeline Company's offices in Atlanta, Georgia.

4. On or about October 4, 1964, the defendants Walter Zirpolo, Robert E. Jacks, Colonial Pipeline Company, Glenn H. Giles, Karl T. Feldman, Ben D. Leuty and Bechtel Corporation, caused Robert L. Bowman and

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants and other persons named herein committed, and caused to be committed, the following overt acts:

1. Between on or about February 12, 1964 and March 23, 1964 in the Township of Woodbridge, County of Middlesex and State of New Jersey, and within the jurisdiction of this Court, the defendant WALTER ZIRPOLO had a telephone conversation with Fred Stewart, an employee of the defendant COLONIAL PIPELINE COMPANY.

2. On or about March 3, 1964 in the Township of Edison and State of New Jersey, the defendant ROBERT E. JACKS had a conversation with Fred Stewart, an employee of the defendant COLONIAL PIPELINE COMPANY.

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William L.J. Fallow to travel in interstate commerce from the State of California to the State of New Jersey.	
5. On or about October 6, 1964, in Edison, New Jersey, in the District of New Jersey, the defendant Robert E. Jacks had a conversation with William L.J. Fallow.	3. On or about October 6, 1964 in the Township of Edison, County of Middlesex and State of New Jersey, the defendant ROBERT E. JACKS had a conversation with WILLIAM L.J. FALLOW.
6. On or about October 6, 1964, the defendants Walter Zirpolo, Robert E. Jacks, Colonial Pipeline Company, Glenn H. Giles, Karl T. Feldman, Ben D. Leuty and Bechtel Corporation, caused William L.J. Fallow, who was then in the State of New Jersey, to use a facility in foreign commerce, to wit, the telephone, to hold a conversation with Harry F. Waste, who was then in Vancouver, British Columbia, Canada.	
7. On or about October 6, 1964, William L.J. Fallow, who was then in the State of New Jersey, used an interstate facility, to wit, the telephone, to hold a conversation with the defendant Glenn H. Giles in Atlanta, Georgia.	4. On or about October 6, 1964, WILLIAM L.J. FALLOW, who was then in the State of New Jersey, had a telephonic conversation with GLENN H. GILES, an unindicted co-conspirator who was then in Atlanta, Georgia.
8. On or about October 6, 1964, the defendant Glenn H. Giles, in Atlanta, Georgia, caused a letter to be mailed from Atlanta, Georgia, to the defendant Bechtel Corporation office in Edison, New Jersey, in the District of New Jersey.	5. On or about October 6, 1964, the unindicted co-conspirator, GLENN H. GILES, in Atlanta, Georgia, caused a letter to be mailed from Atlanta, Georgia to the defendant BECHTEL CORPORATION office in the Township of Edison, County of Middlesex and State of New Jersey.
9. On or about October 7, 1964, the defendant Glenn H. Giles traveled in interstate commerce from the State of Georgia to the State of New Jersey.	

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10. On or about October 11, 1964, the defendants Walter Zirpolo, Robert E. Jacks, Colonial Pipeline Company, Glenn H. Giles, Karl T. Feldman, Ben D. Leuty and Bechtel Corporation, caused William L.J. Fallow to travel in interstate commerce from the State of California to the State of New Jersey.	6. On or about October 11, 1964, the defendants WALTER ZIRPOLO, ROBERT E. JACKS, COLONIAL PIPELINE COMPANY, KARL T. FELDMAN, BEN D. LEUTY, BECHTEL CORPORATION and GLENN H. GILES, an unindicted co-conspirator, caused WILLIAM L.J. FALLOW to travel from the State of California to the State of New Jersey.
11. On or about October 13, 1964, the defendants Walter Zirpolo, Robert E. Jacks, Colonial Pipeline Company, Glenn H. Giles, Karl T. Feldman, Ben D. Leuty and Bechtel Corporation, caused Basel C. Licklider, an employee of the defendant Bechtel Corporation, to travel and transport a sum of money in interstate commerce from the State of New York to the State of New Jersey.	7. On or about October 13, 1964, the defendants WALTER ZIRPOLO, ROBERT E. JACKS, COLONIAL PIPELINE COMPANY, KARL T. FELDMAN, BEN D. LEUTY, BECHTEL CORPORATION and unindicted co-conspirators GLENN H. GILES, WILLIAM L.J. FALLOW, ROBERT L. BOWMAN and HARRY F. WASTE caused BASEL C. LICKLIDER, an employee of the defedant BECHTEL CORPORATION, to travel and transport a sum of money from the State of New York to the State of New Jersey.
12. On or about October 13, 1964, in Edison, New Jersey, in the District of New Jersey, the defendant Robert E. Jacks had a meeting with William L.J. Fallow.	8. On or about October 13, 1964, in the Township of Edison, County of Middlesex and State of New Jersey, the defendant ROBERT E. JACKS on behalf of himself and defendant WALTER ZIRPOLO received the sum of $20,000.00 from WILLIAM L.J. FALLOW.
13. On or about November 19, 1964, the defendant Glenn H. Giles traveled in interstate commerce from the State of Georgia to the State of New Jersey.	
14. On or about November 20, 1964, the defendant Glenn H. Giles had a conversation with Robert L. Bowman in Edison, New Jersey, in the District of New Jersey.	9. On or about November 20, 1964, GLENN H. GILES, an unindicted co-conspirator had a conversation with ROBERT L. BOWMAN in the Township of East Brunswick, County of Middlesex and State of New Jersey.

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15. On or about November 20, 1964 at Little Ferry, New Jersey, in the District of New Jersey, Robert S. Gates caused $25,000 to be transferred from the accounts of the defendant Gates Construction Corporation to the accounts of the defendant Gates Equipment Corporation.	10. On or about November 18, 1964, in Little Ferry, in the State of New Jersey, ROBERT S. GATES caused $25,000.00 to be transferred from the accounts of the defendant GATES CONSTRUCTION CORPORATION to the accounts of the defendant GATES EQUIPMENT CORPORATION.
16. Between on or about November 20, 1964 and on or about December 15, 1964, in Little Ferry, New Jersey, in the District of New Jersey, Robert S. Gates procured $40,000 in United States currency from the accounts of the defendant Gates Equipment Corporation and the defendant Gates Construction Corporation.	11. Between on or about November 18, 1964 and on or about December 15, 1964, in Little Ferry in the State of New Jersey, the said ROBERT S. GATES procured sums totaling $40,000.00 in United States currency from the accounts of the defendant GATES EQUIPMENT CORPORATION and the defendant GATES CONSTRUCTION CORPORATION.
17. Between on or about November 24, 1964, and December 15, 1964, in East Brunswick, New Jersey, in the District of New Jersey, Robert S. Gates delivered $40,000 in United States currency obtained from the accounts of the defendant Gates Construction Corporation and the defendant Gates Equipment Corporation to Robert L. Bowman.	12. Between on or about November 18, 1964 and December 15, 1964 in the Township of East Brunswick, County of Middlesex and State of New Jersey the said ROBERT S. GATES delivered $40,000.00 in United States currency obtained from the accounts of the defendant GATES CONSTRUCTION CORPORATION and the defendant GATES EQUIPMENT CORPORATION to ROBERT L. BOWMAN.
18. Between on or about November 24, 1964 and December 15, 1964, in East Brunswick, New Jersey, in the District of New Jersey, Robert L. Bowman delivered checks of the defendant Bechtel Corporation totaling $84,800 to Robert S. Gates.	13. Between on or about November 18, 1964 and December 15, 1964, in the Township of East Brunswick in the County of Middlesex and the State of New Jersey, ROBERT L. BOWMAN, an unindicted co-conspirator delivered checks of the defendant BECHTEL CORPORATION totaling $84,800.00 to ROBERT S. GATES, an unindicted co-conspirator.

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19. On or about November 24, 1964, in Edison, New Jersey, District of New Jersey, the defendant Robert E. Jacks had a conversation with Robert L. Bowman and Robert S. Gates.	14. On or about November 24, 1964, in the Township of Edison, New Jersey and State of New Jersey, the defendant ROBERT E. JACKS on behalf of himself and defendant WALTER ZIRPOLO received the sum of $20,000.00 from ROBERT L. BOWMAN and ROBERT GATES, both unindicted co-conspirators.
20. On or about December 13, 1964, the defendants, Walter Zirpolo, Robert E. Jacks, Colonial Pipeline Company, Glenn H. Giles, Karl T. Feldman and Ben D. Leuty, caused Robert L. Bowman to travel in interstate commerce from the State of California to the State of New Jersey.	
21. On or about December 14, 1964, in Edison, New Jersey, in the District of New Jersey, the defendant Robert E. Jacks had a conversation with Robert L. Bowman and Robert S. Gates.	15. On or about December 14, 1964, in the Township of Edison, County of Middlesex and State of New Jersey, the defendant ROBERT E. JACKS on behalf of himself and defendant WALTER ZIRPOLO received the sum of $20,000.00 from ROBERT L. BOWMAN and ROBERT S. GATES, both unindicted co-conspirators.
22. On or about December 14, 1964, in Atlanta, Georgia, the defendant Karl T. Feldman caused a check to be issued by the defendant Colonial Pipeline Company payable to the defendant Bechtel Corporation.	16. On or about December 14, 1964, in Atlanta, Georgia, the defendant KARL T. FELDMAN caused a check to be issued by the defendant COLONIAL PIPELINE COMPANY payable to the defendant BECHTEL CORPORATION.
23. On or about December 18, 1964, in Atlanta, Georgia, the defendants Glenn H. Giles, Ben D. Leuty and Karl T. Feldman caused a check of the defendant Colonial Pipeline Company to be mailed from Atlanta, Georgia, to the defendant Bechtel	17. On or about December 18, 1964, in Atlanta, Georgia, the defendants BEN D. LEUTY and KARL T. FELDMAN, and GLENN H. GILES, an unindicted co-conspirator, caused a check of the defendant COLONIAL PIPELINE COMPANY to be mailed from Atlanta,

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Corporation in San Francisco, California.

All of the above in violation of Section 371, Title 18, United States Code.

COUNT VII.

That Walter Zirpolo, Robert E. Jacks, Colonial Pipeline Company, Karl T. Feldman, Glenn H. Giles, Ben D. Leuty and the Bechtel Corporation, the defendants herein, did on or about October 11, 1964, wilfully cause William L. J. Fallow to travel in interstate commerce between San Francisco, California and Edison, New Jersey, in the District of New Jersey, and the defendants did cause said travel with intent to promote, manage, establish and carry on and facilitate the promoting, managing, establishing, and carrying on of an unlawful activity, said unlawful activity being the obtaining of easements by bribery of officials of the Township of Woodbridge, New Jersey, in violation of the laws of the State of New Jersey, and specifically in violation of N.J.S. 2A:93-6, in that the said defendants caused the said William L. J. Fallow to travel in interstate commerce as aforesaid to deliver a sum of money, to wit, $20,000 in United States currency, and further that said defendants did thereafter perform and attempt to

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Georgia to the defendant BECHTEL CORPORATION in San Francisco, California.

All contrary to the provisions of N.J.S. 2A:98-1 and N.J.S. 2A:93-6, and against the peace of this State, the Government and dignity of the same.

COUNT V.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further Present that KARL T. FELDMAN, BEN D. LEUTY, COLONIAL PIPELINE COMPANY and BECHTEL CORPORATION, defendants herein, on or about the 13th day of October, 1964 in the Township of Edison, County of Middlesex and within the jurisdiction of this Court, willfully, unlawfully and corruptly did give and cause to be given the sum of $20,000.00 as a bribe to WALTER ZIRPOLO and ROBERT E. JACKS, also defendants herein, and at the same time and place the said WALTER ZIRPOLO and ROBERT E. JACKS did willfully, unlawfully and corruptly receive the sum of $20,000.00 as a bribe through an intermediary from the said defendants KARL T. FELDMAN, BEN D. LEUTY, COLONIAL PIPELINE COMPANY and BECHTEL CORPORATION, for the purpose of securing from the Township of Woodbridge, in which municipality WALTER ZIRPOLO was the Mayor and ROBERT E. JACKS was President of the Municipal Council, easements and street crossings under property

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perform the acts of promoting, managing, establishing, and carrying on and facilitating the promoting, managing, establishing and carrying on of said unlawfully [SIC] activity, in that the defendants did cause William L. J. Fallow to deliver the aforesaid sum of money to the defendant Robert E. Jacks in Edison, New Jersey, on or about October 13, 1964.

All of the above in violation of Sections 2 and 1952 of Title 18, United States Code.

COUNT VIII.

That Walter Zirpolo, Robert E. Jacks, Colonial Pipeline Company, Karl T. Feldman, Glenn H. Giles, Ben D. Leuty, Gates Construction Corporation and Gates Equipment Corporation, the defendants herein, did on or about November 17, 1964, wilfully cause Robert L. Bowman to travel in interstate commerce between San Francisco, California and Edison, New Jersey, in the District of New Jersey, and the defendants did cause said travel with intent to promote, manage, establish and carry on and facilitate the promoting, managing, establishing, and carrying on of an unlawful activity, said unlawful activity being the obtaining of easements by bribery of officials of the Township of Woodbridge, New Jersey, in violation of N.J.S. 2A:93-6; in that the said defendants caused the said Robert L. Bowman to travel in interstate commerce as aforesaid for the purpose of assisting the defendant

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owned by the Township of Woodbridge for a pipeline then and there being constructed by the Colonial Pipeline Company, contrary to the provisions of N.J.S. 2A:96-3 and N.J.S. 2A:85-14, and against the peace of this State, the Government and dignity of the same.

COUNT VI.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further Present that KARL T. FELDMAN, BEN D. LEUTY, COLONIAL PIPELINE COMPANY, BECHTEL CORPORATION, GATES CONSTRUCTION CORPORATION and GATES EQUIPMENT CORPORATION, defendants herein, on or about the 24th day of November, 1964 in the Township of Edison, County of Middlesex and within the jurisdiction of this Court, willfully, unlawfully and corruptly did give and cause to be given the sum of $20,000.00 as a bribe to WALTER ZIRPOLO and ROBERT E. JACKS, also defendants herein, and at the same time and place the said WALTER ZIRPOLO and ROBERT E. JACKS did willfully, unlawfully and corruptly receive the sum of $20,000.00 as a bribe through an intermediary from the said defendants KARL T. FELDMAN, BEN D. LEUTY, COLONIAL PIPELINE COMPANY, BECHTEL CORPORATION, GATES CONSTRUC-

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Gates Construction Corporation, the defendant Gates Equipment Corporation and Robert S. Gates to deliver a sum of money, to wit, $20,000, in United States currency, and further that said defendants did thereafter perform and attempt to perform the acts of promoting, managing, establishing, and carrying on and facilitating the promoting, managing, establishing and carrying on of said unlawful activity, in that the defendants did cause Robert L. Bowman and Robert S. Gates to deliver the aforesaid sum of money to the defendant Robert E. Jacks in Edison, New Jersey, on or about November 24, 1964.

All of the above in violation of Sections 2 and 1952, Title 18, United States Code.

COUNT IX.

That Walter Zirpolo, Robert E. Jacks, Colonial Pipeline Company, Karl T. Feldman, Glenn H. Giles, Ben D. Leuty, Gates Construction Corporation and Gates Equipment Corporation, the defendants herein, did on or about December 13, 1964 wilfully cause Robert L. Bowman to travel in interstate commerce between San Francisco, California and Edison, New Jersey, in the District of New Jersey, and the defendants did cause said travel with intent to promote, manage, establish, and carry on and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the obtaining of easements by bribery of officials of the

STATE

TION CORPORATION and GATES EQUIPMENT CORPORATION, for the purpose of securing from the Township of Woodbridge, in which municipality WALTER ZIRPOLO was the Mayor and ROBERT E. JACKS was President of the Municipal Council, easements and street crossings under property owned by the Township of Woodbridge for a pipeline then and there being constructed by the Colonial Pipeline Company, contrary to the provisions of N.J.S. 2A:96-3 and N.J.S. 2A:85-14, and against the peace of this State, the Government and dignity of the same

COUNT VII.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further their Present that KARL T. FELDMAN, BEN D. LEUTY, COLONIAL PIPELINE COMPANY, BECHTEL CORPORATION, GATES CONSTRUCTION CORPORATION and GATES EQUIPMENT CORPORATION, defendants herein, on or about the 14th day of December, 1964 in the Township of Edison, County of Middlesex and within the jurisdiction of this Court, willfully, unlawfully and corruptly did give and cause to be given the sum of $20,000.00 as a bribe to WALTER ZIRPOLO and ROBERT E. JACKS, also defendants herein, and at the same time and place the said WALTER ZIRPOLO and ROBERT E. JACKS did willfully, unlawfully and

FEDERAL	STATE
Township of Woodbridge, New Jersey, in violation of the laws of the State of New Jersey, and specifically in violation of N.J.S. 2A:93-6, in that the said defendants caused the said Robert L. Bowman to travel in interstate commerce as aforesaid for the purpose of assisting the defendant Gates Construction Corporation, the defendant Gates Equipment Corporation and Robert S. Gates to deliver a sum of money, to wit, $20,000 in United States currency, and further that said defendants did thereafter perform and attempt to perform the acts of promoting, managing, establishing and carrying on and facilitating the promoting, managing, establishing, and carrying on of said unlawful activity, in that the defendants did cause Robert L. Bowman and Robert S. Gates to deliver the aforesaid sum of money to the defendant Robert E. Jacks in Edison, New Jersey, on or about December 14, 1964. All of the above in violation of Sections 2 and 1952 of Title 18, United States Code.	corruptly receive the sum of $20,000.00 as a bribe through an intermediary from the said defendants KARL T. FELDMAN, BEN D. LEUTY, COLONIAL PIPELINE COMPANY, BECHTEL CORPORATION, GATES CONSTRUCTION CORPORATION and GATES EQUIPMENT CORPORATION, for the purpose of securing from the Township of Woodbridge, in which municipality WALTER ZIRPOLO was the Mayor and ROBERT E. JACKS was the President of the Municipal Council, easements and street crossings under property owned by the Township of Woodbridge for a pipeline then and there being constructed by the Colonial Pipeline Company, contrary to the provisions of N.J.S. 2A:96-3 and N.J.S. 2A:85-14, and against the peace of this State, the Government and dignity of the same.
A TRUE BILL	A True Bill:
_____	_____
Foreman	*Foreman* FLOYD W. GAUDET
	_____
	County Prosecutor EDWARD J. DOLAN
_____	
DAVID M. SATZ, JR. *United States Attorney*	

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

~~Nos. 1832, 1852, 1853, 1854, 1862~~

70-287, 70-307, 70-308, 70-317

ROBERT E. JACKS,
Petitioner in No. 1832,

BECHTEL CORPORATION,
Petitioner in No. 1852,

KARL T. FELDMAN,
Petitioner in No. 1853,

COLONIAL PIPELINE COMPANY,
Petitioner in No. 1854,

BEN D. LEUTY,
Petitioner in No. 1862,

vs.

STATE OF NEW JERSEY,
Respondent.

On Petitions for Certiorari to the Superior Court of New Jersey, Middlesex County

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 1832, 1852, 1853, 1854, 1862

ROBERT E. JACKS,
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BECHTEL CORPORATION,
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Petitioner in No. 1853,

COLONIAL PIPELINE COMPANY,
Petitioner in No. 1854,

BEN D. LEUTY,
Petitioner in No. 1862,

vs.

STATE OF NEW JERSEY,
Respondent.

On Petitions for Certiorari to the Superior Court of New Jersey, Middlesex County

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

Respondent, State of New Jersey, respectfully prays that writs of certiorari sought in the above-captioned pe-

titions to review the interlocutory order of the Superior Court of New Jersey, Law Division, Middlesex County, entered December 8, 1969 denying motions of all petitioners to dismiss pending indictments, be denied. Inasmuch as these cases arise out of a single series of transactions and largely involve identical issues of law, this brief is offered as a consolidated response to all pending petitions.

Counter-Statement of Jurisdiction

Respondent denies that this Court possesses jurisdiction under 28 U.S.C. §1257 (3) to consider the above-named matter on petition for certiorari.

The theory upon which all petitioners assert the jurisdiction of this Court, when applied to the facts of the instant cases, does not project the requisite "final order or decree" upon which such jurisdiction must be founded. In essence, petitioners say that if this Court ultimately finds that *Bartkus* v. *Illinois,* 359 U. S. 121 (1959), should be overruled, leaving aside the facts of these cases, jurisdiction is properly asserted, and a substantial federal question is thereby presented. But they do not cite a another instance where this Court has considered an interlocutory order of a state court as final for purposes of jurisdiction through a similar exercise in prospective overruling. *Cf. Carroll* v. *United States,* 354 U. S. 394, 403-405 (1957).

The more fundamental infirmity of the instant petitions is their common assumption that respondent's ability to try them on the pending state indictments is pivoted exclusively on the vitality of the *Bartkus* doctrine. It is demonstrated below that this notion must fall of its own weight, and with it any basis for present jurisdiction.

Moreover, before the dual sovereignty question can even be brought into focus, the trial court must have an adequate opportunity to develop the factual issues in these cases in light of the collateral estoppel principles articulated in *Ashe* v. *Swenson,* 397 U. S. 436 (1970). An application of those principles and stipulations of facts by the parties may make it evident that in trying petitioner, *Bartkus* need not be invoked at all to avoid collision with the general principles of double jeopardy, even upon counts which appear to parallel those upon which petitioners were acquitted in the federal courts.

In trying petitioners Jacks, Leuty and Feldman the trial court must focus upon the same facts embraced in the two all-encompassing conspiracy counts upon which they were initially convicted, but have hitherto escaped punishment.

Thus, even assuming *Bartkus* were no longer the law at this moment, and trial on the similar counts would be technically improper under the principles of collateral estoppel, trying petitioners upon such additional counts would itself involve no greater burden, anxiety or expense than trial limited to the all-embracing conspiracy charges; nor could it by itself constitute irreparable jury. *Younger* v. *Harris,* —— U. S. ——, 91 S. Ct. 746, 751 (1971). Even accepting petitioners' premise that *Bartkus* has been emasculated, trial on the added counts would amount to harmless error.

Likewise, given the present posture of these cases and the facts that *Bartkus* is the law at this moment, the dual sovereignty question will only become substantial and ripe for the Court's decision when it is presented in terms of respondent's ability to impose a punishment after the courts of New Jersey have passed upon it on

a full record. In every case which has served as a vehicle for re-examination of the double jeopardy clause in a state or inter-jurisdictional context, this Court has only considered such questions in terms of the possibility of punishment; e.g., *Bartkus* v. *Illinois, supra; Abbate* v. *United States,* 359 U. S. 187 (1959); *Benton* v. *Maryland,* 395 U. S. 784 (1969); *Ashe* v. *Swenson, supra.* On the other hand a procedure which allowed interlocutory assaults on governing precedents would be antiethical to any notion of comity and a grave hindrance to the administration of justice.

Hence, review at this juncture would be premature since the *Bartkus* question, which has real significance only in terms of punishment on the substantive counts must remain hypothetical until the possibility of such punishment becomes imminent.

Counter-Statement of Questions Presented

1. Are corporations within the protection of the Fifth Amendment guarantee that: "no person . . . shall be subject, for the same offense, to be twice put in jeopardy of life and limb . . ."?

2. May a state try a defendant under a valid state indictment after defendant's convictions on similar federal charges has been set aside at the instance of defendant without a showing of prejudice to defendant, upon a finding that the grand jury which returned the federal indictments was improperly selected?

3. Is a prosecution under N.J.S.A. 2A:93-6 (following an acquittal upon federal charges alleging violation of 18 U.S.C. §1952 based on an "intent" to facilitate or promote the violation of N.J.S.A. 2A:93-6 through interstate

means) barred under the principles of collateral estoppel lately set down in *Ashe* v. *Swenson, supra?*

4. Assuming the right of a state to try a defendant on several counts of an indictment including the all-embracing conspiracy counts is not dependent on the doctrine of dual sovereignty, should this Court before trial grant review to determine whether *Bartkus* v. *Illinois,* should be overruled in order to avoid the possibility that ultimately the right of the state to punish defendant upon a conviction on other counts might depend on the fact of the state's separate sovereignty?

Counter-Statement of the Case

From early in 1963 and through the end of 1964, petitioner, Colonial Pipeline Co. ("Colonial") a corporation of which petitioner Leuty was president, and petitioner Feldman was vice president, engaged in the construction of an interstate pipeline system terminating in New Jersey. Petitioner Bechtel Corporation ("Bechtel") was under contract with Colonial to perform some of the engineering and construction work on the project. Colonial's wished to establish a terminal facility for the system in Woodbridge, New Jersey, within the Port Reading section of the third ward in that township. During 1963, the third ward was represented on the Woodbridge township committee by petitioner Robert E. Jacks. On January 1, 1964, Jacks assumed the position of president and voting member of the Municipal Council of Woodbridge. Walter Zirpolo, at all times relevant to these cases served as mayor of Woodbridge and as a voting member of its planning board.

The terminal facility envisioned by Colonial involved the construction of 22 petroleum storage tanks for which

a building permit was required. Apparently, Colonial was aware of stiff opposition among the residents of the third ward to the project. Realizing that legitimate channels might be unavailing, Colonial solicited the assistance of Mayor Zirpolo in securing the permit. In order to complete the system, Colonial also was required to obtain easements from the City of Woodbridge to permit it to run the pipeline through township property to the projected terminal point. Colonial also sought Zirpolo's assistance in promoting the sale of the easements from the township to Colonial.

However, Zirpolo was not able to offer immediate assistance. An election was imminent (on November 3, 1963) and Zirpolo was a candidate for re-election. His associate Jacks was running for the council post. They both had promised their constituents that no new tanks would be built in the Port Reading area. Consequently Zirpolo informed Colonial that it would be more feasible politically to defer formal action on the permit and easements until after the election. In the interim the details of the plan were worked out between a representative of Colonial and Jacks acting on behalf of himself and Zirpolo.

Eventually the officers of Colonial including Leuty and Feldman accepted the plan as proposed by Zirpolo and Jacks. Two separate conspiracies were developed. The conspiracy to obtain the building permit assumed the following configuration: Colonial's officers agreed to a bribe of $50,000.00 to Zirpolo and Jacks in the guise of a campaign contribution to assure their assistance in the matter. The money was to come from Colonial's Atlanta office and be delivered in separate installments of $20,000.00, $15,000.00 and $15,000.00. Colonial officers, most

prominently Leuty and Feldman, enlisted the aid of one of their sub-contractors to transmit the payments to Zirpolo and Jacks in New Jersey. The first payment was to be made on the day following the election; the second payment was to be due at the time of the issuance of the building permit and the final payment was to be made after the certificate of occupancy had been issued to Colonial by the township. Respondent will seek to prove on trial that all of this came to pass.

Beginning in January of 1964, a second conspiracy was developed among Colonial's officers and Zirpolo and Jacks to obtain the desired easement. For their assistance in this matter, Zirpolo and Jacks were to receive the amount of $10,000.00 from Colonial. Leuty and Feldman and other Colonial officers in working out the details of this scheme and its eventual execution. This plan also came to fruition as will be proven at trial.

In February 1967, all of the petitioners, as well as several others, were indicted by a federal grand jury for various substantive violations of 18 U.S.C. §1952 and conspiracy to violate that act based on the foregoing transactions. The federal indictment charged all of the petitioners with the exception of Bechtel in seven substantive counts, alleging separate acts of unlawfully employing the facilities of interstate commerce to ". . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of . . . [and] unlawful activity . . . [i.e.] extortion; . . . [or] bribery in violation of the laws of the state in which committed or of the United States . . ." It is recited therein that the alleged wrongful use of interstate means was intended to facilitate the violation of N.J.S.A. 2A:93-6, a bribery statute, and other bribery laws, although the federal indictments do not charge that such New Jersey laws were thereby violated.

Also included in the federal indictments were two conspiracy counts relating first to the scheme developed to obtain the building permit and second, to the plan to procure the sale of the easements. Bechtel, unlike the other petitioners, was only charged with participating in the second conspiracy and in conduct designed to affect a payment to Jacks and Zirpolo in New Jersey, pursuant to that scheme.

On January 3, 1969, verdicts were returned on the federal indictments against all petitioners. Petitioner Colonial was found guilty on all counts and fined a total of $90,000.00; petitioners Leuty and Feldman were found guilty only on the two conspiracy counts; petitioner Bechtel was found guilty on both of the counts on which it had been indicted; petitioner Jacks was found guilty on both conspiracy counts and one substantive count.

The United States Court of Appeals for the Third Circuit set aside petitioners federal convictions on the ground that the method used in the district of New Jersey to impanel the grand jury which returned the federal indictments departed from the pertinent statutory standard and resulted in a systematic under-representation of women. However, in setting aside the convictions the court noted that there was no proof of prejudice to petitioners resulting from this improper practice. *United States* v. *Zirpolo, et al.*, —— F. 2d ——, Crim. Nos. 18,-137-18,142, 3 Cir., Feb. 18, 1971 (Slip opinion, at 7-8). The Third Circuit on July 1, 1971, denied the petition of the United States for re-hearing *en banc* in these cases and the government has been required to reindict petitioners.

After the return of the federal indictments, the Middlesex County grand jury returned a series of indictments against petitioners relating to state violations arising out

of the same transactions which formed the basis of the federal indictments. Most of these charges allege violations of N.J.S.A. 2A:93-6, the bribery statute, whose violation was recited to be the intended object of the proscribed activity forming the basis of the federal indictments. Petitioners were also charged in various counts with aiding and abetting violations of N.J.S.A. 2A:93-6, as well as with two separate counts of conspiracy to violate this provision. Separate indictments were also returned against Jacks and Zirpolo, charging them with two conspiratorial and five substantive violations of N.J.S.A. 2A:105-1 which prohibits unlawful takings by public officers under color of office. A third state indictment was returned charging Jacks alone with five counts of common law misconduct in office in violation of N.J.S.A. 2A:85-1.

Petitioners applied before Mr. Justice Brennan for stay of the state proceedings pending the filing of petition for certiorari in this Court. After full review of petitioners' applications supported by briefs, which set forth the same arguments made in the pending petitions, as well as respondent's memorandum in opposition to the application, Mr. Justice Brennan denied such applications on April 23, 1971.

Reasons for Denying the Writ

Petitioners have portrayed all the pending cases as frontal assaults on the doctrine of *Bartkus* v. *Illinois*, 358 U. S. 121 (1959). Respondent will demonstrate that at best the *Bartkus* question is tangential in every one of these cases in their present postures and clearly insubstantial. In every case the threshhold question is respondent's ability to *try* the particular petitioner involved on

some basis and such ability does not rest on *Bartkus*. Respondent contends that at this juncture the Court is without jurisdiction in the pending cases, irrespective of whether at some later time respondent's ability to punish petitioners for some of the offenses alleged may depend upon the survival of the dual sovereignty concept. It at a later point in the proceedings, this question rises above a hypothetical concern and is decided adversely to petitioners by the courts of New Jersey, it might then and only then become ripe for review by this Court.

In support of respondent's contention that its present right to *try* petitioners is beyond challenge, it will demonstrate that: (a) the double jeopardy clause of the Fifth Amendment protects only natural persons and may not be availed of by the corporate petitioners, Bechtel and Colonial; (b) the statutes under which respondent seeks to try petitioners are conceptually distinct from 18 U.S.C. §1952 and require the proof of wholly different acts in order to establish the violations in question; (c) trial of petitioners upon separate state indictments, following the setting aside upon motions of petitioners of their convictions on similar federal charges on the ground that the underlying federal indictments were technically defective is entirely consistent with the federal standards set forth in *Ewell* v. *U. S.*, 383 U. S. 116, (1966) and applied to the states under *Benton* v. *Maryland, supra,* and any erosion of the dual sovereignty concept must serve to reinforce this conclusion; (d) trial of all petitioners, particularly petitioner Jacks, who acknowledges that the federal substantive charges against him failed only because there was no proof of interstate activity on his part, is fully consistent with the collateral estoppel doctrine of *Ashe* v. *Swenson, supra,* even under the principles urged on this Court by Justice Brennan, *Id.*, 397 U. S., at 53, n.7.

POINT I

Respondent seeks to prosecute petitioners for violations of statutes that are conceptually distinct, and require different proofs from the violations under 18 U.S.C. §1952 for which they were tried.

Petitioners state that respondent is seeking to prosecute them a second time for violations of the same statute for which they have already been tried in the federal courts. Such representations are plainly inaccurate as a glance at the federal indictments reveals. (See Petitioner Leuty's Appendix "D").

The federal government attempted to prosecute petitioners for violating U.S.C. §1952. Like penal provisions generally, a violation of this statute is founded upon the merger of certain conduct with a certain intent. The conduct in question is described as ". . . [travelling] in interstate or foreign commerce or . . . [use of] any facility in interstate or foreign commerce. . . ." 18 U.S.C. §1952.

However, such acts are only punishable under 18 U.S.C. §1952 if they are undertaken with the "intent" to (inter alia):

> ". . . (3) . . . promote, manage, establish, carry on, or facilitate the promotion, management, or carrying on of any unlawful activity."

The "unlawful" "activity" that is the object of the accompanying intent may take one of several forms, to wit:

> (1) ". . . [a] business enterprise involving gambling, liquor on which the federal exise tax has

> not been paid, narcotics, or prostitution offenses in violation of the laws of the state in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which they are committed . . . or [extortion, bribery, or arson in violation of the laws] of the United States." 18 U.S.C. §1952(b)

The configuration of this statute is reminiscent of the common law crime of burglary which is also a product of the merger of a species of often-innocuous conduct with an intent to commit certain types of illegal acts. (i.e., felonies). The crime of burglary is, of course, conceptually distinct from whatever felony might ensue. The burglary and the felony remain separately punishable though they share and require proof of but a single intent.

To similar effect, it is obvious that Congress in passing 18 U.S.C. §1952 did not thereby intend to have that statute supplant every existing federal gambling, liquor, narcotics, prostitution, extortion, bribery, or arson statute then in force. But in the final analysis the petitioners' contentions reduce to an assertion that in enacting the Travel Act; 18 U.S.C. §1952, Congress vested the federal courts with pre-emptive jurisdiction in any case where the alleged violation of a state statute of the classes enumerated in 18 U.S.C. §1952 is touched by interstate activity. It should be self-evident that Congress did not intend this result, particularly where violation of a state rather than a federal law is concerned. To suppose otherwise would be at odds with the whole philosophy of federalism that undergirds our system of government.

Moreover, petitioners' notion is strongly belied by observations of this Court in *United States* v. *Nardello*, 393 U. S. 286 (1969). In *Nardello*, this Court found the purpose of the Travel Act was to supplement, not supplant the machinery available to local officials in combating crime. *Id.* 393 U. S. at 290. The Act was designed only as a means of reaching into those areas of wrongful conduct which could not be dealt with under state law. Its purpose, as illuminated in *Nardello*, was to close gaps that existed in both federal and State law enforcement schemes rather than as petitioners contend, to "backstop" or, more accurately, pre-empt local law enforcement. Petitioners do not point to a single case where prosecution under 18 U.S.C. §1952 has been held to bar simultaneous prosecution and conviction under the same federal indictment for commission of the substantive federal crime that the proscribed interstate activity was intended to promote or facilitate. *Cf. Gore* v. *United States*, 357 U. S. 386 (1958), *reh. den.* 358 U. S. 858. To suppose otherwise would do obvious violence to the clear intent of Congress.

While the violations charged in the various state indictments in the instant cases by-and-large charge the same intent (*mens re*) as the violations charged in the federal indictments, the acts proscribed thereunder are wholly distinct and separate from the acts which form the basis for the violations of 18 U.S.C. §1952 charged under the federal indictments. Just as in a prosecution for common law burglary, it is possible for one to commit burglary with the requisite felonious intent without being chargeable for the intended felony or, on the other hand, to be chargeable with the intended felony in a situation where the elements of common law burglary are not present (e.g., where the entry takes place in the day-

time), the federal law may be violated without the occurrence of a state violation, or vice versa. Of course, with regard to the violations of N.J.S.A. 2A:85-1 and N.J.S.A. 2A:105-1 for which the defendant Jacks was separately indicted, the requisite intent is not shared by the state violations charged and the federal violations for which Jacks was prosecuted.

In any event it is plain that the federal prosecution of these petitioners could implicate no more than the intent element of the violations of N.J.S.A. 2A:93-6 charged under the state indictments. Thus, as petitioner Leuty acknowledged in the lower court, even if the double jeopardy guarantee is to be applied in these cases, it must be applied in the form of collateral estoppel, not actual *res judicata.*

Ashe v. *Swenson, supra,* is a controlling authority in this area. The Court in *Ashe* stated the principles of collateral estoppel to be: ". . . simply that when an issue of ultimate facts has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any further law suit." *Id.* 397 U. S., at 443. Assuming, for argument's sake, that separate sovereignty is to have no force and federal and state governments must therefore be treated as the same party for purposes of collateral estoppel it still remains apparent in all these cases that: ". . . a rational jury [in the federal case] could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* 397 U. S., at 444 (footnote omitted). Indeed, petitioner Jacks candidly admits that he avoided conviction on several substantive charges only because of a lack of evidence concerning his involvement with interstate activities. The corporate petitioners, of course, were found guilty on all counts so that there

is no basis for contending that the State seeks reconsideration of any issue of ultimate fact with regard to either of them.

Petitioner Leuty however contends that although his acquittal on the substantive charges of the federal indictment was based upon a general verdict, the only factual question regarding his guilt in dispute there was that of *intent* to commit bribery. This contention is strongly belied by the federal jury's determination of guilt on the conspiracy counts which required the identical determination of intent. In any event, only the trial court would be in a position to make the pragmatic inquiry directed by *Ashe* as to the "sameness" of the evidence to be presented in the state prosecution.

It is interesting to note that even if this Court were to adopt the "same transaction test" urged by Mr. Justice Brennan in *Ashe* v. *Swenson, supra,* 397 U. S. at 448 *et seq.,* collateral estoppel would not bar the State prosecution. The federal courts have not tried these petitioners for violation of N.J.S.A. 2A:93-6. They lack jurisdiction to do so. Neither the federal court nor the state court has jurisdiction to try petitioners for all of the violations arising out of the transactions in question. As Mr. Justice Brennan noted, even the expansive view of the double jeopardy clause he would have adopted could not bar a second prosecution where no single court had jurisdiction of all the alleged crimes arising out of a single transaction. *Id.* 397 U. S., at 453, n. 7.

Thus, respondents submit that even if the dual sovereignty doctrine of *Bartkus* no longer held any force, prosecution of these defendants would be entirely compatable with the principles of double jeopardy relevant to these cases.

POINT II

Petitioners, Colonial and Bechtel are not protected by the Double Jeopardy Clause of the Fifth Amendment.

Two of the petitioners in these cases are multi-million dollar corporations. They have no standing to invoke the protection of the Double Jeopardy Clause of the Fifth Amendment which provides that:

> "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

Plainly, a corporation, which is without "life or limb" was not intended to be protected by this provision. Even Mr. Justice Black on behalf of the dissenters in *Bartkus, supra,* made clear throughout his opinion that his conception of the protection afforded by the guarantee extended only to natural persons. (E.g., "people", *id.* at 151; "a man", *id.* at 155; "people", *id.* at 156; "a man", *id.* at 160; "the poor and the weak in our society, individuals without friends in high places", and "a man", *id.* at 163). See also *Barton* v. *Maryland, supra.* (Opinion of Mr. Justice Marshall).

The notion that corporations have standing to invoke the double jeopardy clause appears to be unsupported by any authority other than some off-hand comments by a California district court. (*U. S.* v. *Arnco Steel Corp.*, 252 F. Supp. 364, 368 (D. C. Cal. 1966)). Subsequently however, this Court held in *Campbell Painting Corp.* v. *Reid,* 392 U. S. 286 (1968) that the Fifth Amendment privilege against self-incrimination applies only to natural individuals. *Id.* 392 U. S. at 288, 20 L. Ed. 2d at 1097. Unlike the self-incrimination clause nothing in the double

jeopardy clause has any pertinence to non-natural persons. Clearly its protection is not available to a corporation. For this reason in addition to others, respondent respectfully submits that the petitions of Colonial and Bechtel must be denied.

POINT III

Trial of petitioners on counts similar to counts upon which they were convicted under an invalid federal indictment later set aside is consistent with the applicable federal standard of double jeopardy.

It is well established in federal law that a defendant can claim no former jeopardy after a judgment for conviction upon an invalid indictment has been set aside as a result of defendant's challenge to the indictment. *Ewell* v. *United States, supra,* 383 U. S. at 124; *Ball* v. *United States,* 163 U. S. 662, 672, 16 S. Ct. 1192, 1195 (1896). The doctrine of "continuing jeopardy", (e.g. *Price* v. *Georgia,* 398 U. S. 322 (1970); *Green* v. *United States,* 355 U. S. 184, 189 (1957), is inapposite where defendant has procured a reversal of conviction on the basis of the invalidity of the indictment (e.g., *Ewell, supra, Ball, supra,*) rather than on the basis of trial errors (e.g., *Price, supra, Green, supra*).

The foregoing conclusion is inescapable, in view of the illumination of the conceptual basis of *Ewell* provided by recent circuit decisions. In *United States* v. *Beard,* 414 F. 2d 1014 (3d Cir. 1969) the court found that a count in an indictment which failed to allege unlawful or fraudulent intent was a nullity. Based upon this determination the court citing in support *Ball, supra,* and *Ewell,*

supra, stated that: "The United States will be free to reindict and retry these defendants according to law." *Id.* 414 F. 2d at 1017. *United States* v. *Franke,* 409 F. 2d 958 (7 Cir. 1969) is to similar effect.

If, for purposes of the constitutional guarantee, no former jeopardy attached from trial and conviction on various counts of the invalid federal indictments, now quashed, *a fortiori,* prosecution under these counts cannot bar prosecution by the State under an indictment which includes similar counts. The holding of *Benton* v. *Maryland,* 395 U. S. 784 (1969), that the state and federal standards of double jeopardy are the same dictates this conclusion. Moreover, the thrust of petitioner's assault upon the dual sovereignty doctrine is that the federal and state governments should be regarded as one for purposes of the second trial. A contention that the State, after a defendants conviction and subsequent reversal of conviction under circumstances not amounting to former federal jeopardy, is barred from trying the defendant is therefore incompatible with this notion since the former must rest of course on the maintenance of formal distinctions between the prosecutorial agencies.

For the foregoing reasons, in addition to those stated in prior sections, it is respectfully submitted that respondent's ability to retry, if not punish, on every count, each of the petitioners is not dependent upon the dual sovereignty doctrine and is fully consistent with pertinent federal principles of double jeopardy.

POINT IV

Recent decisions of this Court have not undermined the dual sovereignty concept embodied in *Bartkus* v. *Illinois*.

Contrary to the view expressed by petitioners, *Murphy* v. *Waterfront Commission*, 378 U. S. 52 (1964), in no respect represents a repudiation of the dual sovereignty concept articulated by the court a few years before *Bartkus*. Indeed, the configuration of the rule which emerged from *Murphy* was the direct result of the Court's punctilious recognition of the need to accomodate law enforcement interests of both the state and the federal sovereigns within its constitutional framework. *Id.* 378 U. S., at 79. More recently, in *Waller* v. *Florida*, 397 U. S. 387 (1970) the gravamen of the Court's decision was its determination that unlike the relationship between the states and the federal government, i.e., as separate sovereigns, a city is merely a subdivision of the state sovereign and cannot assert the prerogatives of separate sovereignty.

But even were *Bartkus* to lose some of its force, Mr. Justice Frankfurter's discussion of the effect of a bar on the states in bringing a second prosecution related to the federal prosecution would continue to be pertinent to the instant case. Mr. Justice Frankfurter pointed out that even in such a situation there must remain, for the trial court the knotty task ". . . of determining when the federal and state statutes are so much alike that a prosecution under the former bars a prosecution under the latter . . ." *Bartkus, supra*, 359 U. S. at 137.

Mr. Justice Frankfurter continued:

> "The proper solution of that problem frequently depends upon the gravamen of the state statute.

> It depends also upon an understanding of the scope of the bar that has been historically granted in the state to prevent successive state prosecutions. *Both of these problems are ones which the states are obviously more competent to handle than is this court.*" *Ibid.* (emphasis supplied).

Likewise, respondent respectfully submits that this Court should not undertake such determination until the courts of New Jersey have had an adequate opportunity to make this judgment on a full record. Clearly at this juncture in the proceedings they have not had that opportunity.

CONCLUSION

For all of the foregoing reasons, respondent, State of New Jersey respectfully prays that the writs of certiorari sought in the above-named petitions pending before this Court not issue.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

DOCKET ~~No. 1862~~ 70 - 317

BEN D. LEUTY, *Petitioner,*

—against—

THE STATE OF NEW JERSEY, *Respondent.*

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Dated: September 27, 1971

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

In its opposition to Leuty's petition, New Jersey has misstated the issues in the case; has ignored the identity of legal and factual issues raised by the State and Federal indictments; and has posed irrelevant arguments about the possibility of a Federal retrial.

NEW JERSEY HAS MISSTATED THE ISSUES IN THE CASE

New Jersey maintains that Leuty's petition depends solely upon the Court's willingness to overrule *Bartkus* v. *Illinois*, 359 U. S. 121. (Brief in Opposition, pp. 2-3, 19-20.) This is not so. Leuty's petition to this Court rests on two alternative grounds:

1. The Double Jeopardy Clause forbids the State to force a defendant to trial on a charge of violating a statute

after the Federal Government, under a virtually identical indictment, has tried him for the same alleged violations of the identical statue. By its own terms, this Court's prior decision in *Bartkus* does not govern such a situation.

2. If *Bartkus* were expanded to permit such a retrial, then *Bartkus* should be overruled.

Thus, the continued vitality of *Bartkus* is a question that could but need not be reached in granting Leuty's petition.

New Jersey's discussion of collateral estoppel principles is similarly misplaced. Leuty asserts that his impending State trial will violate the guarantee against *double jeopardy*. He nowhere asks this Court to rule upon the issue of a possible collateral estoppel. Collateral estoppel was raised below as a separate, alternate argument in addition to Leuty's double jeopardy point. (See Leuty's Petition, Appendix B, p. 7a.) Leuty does not raise his collateral estoppel point here. Thus, the State's reference to *Ashe* v. *Swenson*, 397 U. S. 436, is beside the point. (Brief in Opposition, pp. 3-5, 10, 14-15.)

NEW JERSEY ERRS IN ITS ARGUMENT THAT THE FEDERAL AND STATE ACTIONS ARE "CONCEPTIONALLY DISTINCT AND REQUIRE DIFFERENT PROOFS"

A. The Federal and State Actions Are Not "Conceptually Distinct."

Both the Federal statute (18 U. S. C. § 1952) and the State statute (N. J. S. 2A:93-6) have a common target, the punishment of bribery in violation of N. J. S. 2A:93-6. This is clear from the fact that the statutes are conceptually and procedurally identical, since the Federal statute is violated *only if* there is proof of *acts that violate or attempt to violate State law*. This is clear also from the fact that the Federal indictment alleged seven violations or attempted

violations of State law. Those allegations were not surplusage; they were necessary to a valid indictment.* In only one respect, in fact, do the Federal and State statutes differ. The availability of Federal resources for the execution of the State's policy is limited to cases where the accused is alleged to have used interstate facilities. In Leuty's case, the presence of such use was never challenged.

B. The Federal and State Actions Involve the Same Events and Evidence.

New Jersey does not dispute that the Federal prosecutor tried Leuty for violating New Jersey law, nor that the events and evidence that were the subject of the Federal trial will be the subject of the State trial as well. Indeed, New Jersey's own Counter-Statement of the Case reveals that the acts upon which it will rely are identical with those invoked by the Federal Government. (Brief in Opposition, pp. 5-9.) Significantly, the State nowhere suggests one fact or one issue not already aired at the Federal trial.

NEW JERSEY'S ARGUMENT THAT THE TRIAL COURT MUST HAVE AN OPPORTUNITY TO DEVELOP THE FACTUAL ISSUES LACKS MERIT.

As noted above, New Jersey suggests no fact or issue to be determined by the State trial court that has not already been tried out in the Federal arena. The suggestion that the double jeopardy issue must await resolution by

*An examination of Appendix D of Leuty's Petition clinches the point. Each count of the Federal indictment alleged that Leuty's acts were intended to violate N. J. S. 2A:93-6. Each of the substantive counts alleged that Leuty's acts constituted either a violation or an attempted violation of N. J. S. 2A:93-6. Each of the conspiracy counts alleged as the object of the conspiracy the violation of N. J. S. 2A:93-6, and as the overt acts, the violations of N. J. S. 2A:93-6 which were the basis for the substantive counts. (Leuty's Petition pp. 13a, 23a, 24a, 26a, 27a, 28a, 29a, 39a, 41a.)

the State court amounts to the Micawberish hope that at a second trial something new will "turn up" that will enable a State conviction to withstand a subsequent double jeopardy attack. This is precisely the evil the Double Jeopardy Clause was intended to avoid.

WHETHER PETITIONER CAN BE SUBJECTED TO A SECOND FEDERAL TRIAL IS IRRELEVANT.

Whether or not the Federal Government can retry petitioner on any count of the Federal indictment,* no State trial is constitutionally permissible. Any Federal retrial can take place only under the doctrine of "continuing jeopardy." *Price* v. *Georgia,* 398 U. S. 323.** But that justification does not permit a State prosecutor to commence a new case against Leuty.*** The guarantee against double jeopardy has always been, at the very least, a guarantee "against jeopardy in a new and independent case." *Palko* v. *Connecticut,* 302 U. S. 319, 323, overruled on other grounds, *Benton* v. *Maryland,* 395 U. S. 784.

Observance of this rule is particularly appropriate here. Since the filing of Leuty's petition, the Federal prosecutor has secured the return against Leuty of a *second* Federal indictment, identical in all material respects to the first Federal indictment. Not only has Leuty been reindicted on the two counts of conspiring to violate New Jersey law on which he was initially convicted, but he has also been reindicted on the seven substantive violations of New Jersey law of which his first jury acquitted him. To subject a

*Petitioner denies that such a Federal retrial would be lawful.

**In *Price,* the Court held that a defendant who obtained a reversal of his conviction could be retried for the convicted offense. Retrial, the Court said, was not a second jeopardy, but rather, a part of "[a] continuing jeopardy that has application where criminal proceedings against an accused have not run their full course." *Id.* at 326.

***New Jersey's authority, *United States* v. *Ewell,* 383 U. S 116, does not involve a new prosecutor beginning a new case.

citizen, already once indicted and tried, to the ordeal of facing again both a new Federal trial and a new State trial on new indictments for the same alleged violations of the identical statute by the same conduct is to defy the standards of civilized behavior. Neither double jeopardy nor due process should tolerate it.

CONCLUSION

For the foregoing reasons, petitioner prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

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Dated: September 27, 1971

CERTIORARI DENIED N.C.R.